Appointment

From: Ross, David P [ross.davidp@epa.gov]

Sent: 2/20/2019 8:40:23 PM

To: Ross, David P [ross.davidp@epa.gov]; donp@fb.org

Subject: Farm Bureau Water Advisory Committee

Location: 600 Maryland Ave SW, Washington DC 20024 Suite 1000W

Start: 2/21/2019 3:00:00 PM **End**: 2/21/2019 3:45:00 PM

Show Time As: Busy

Recurrence: (none)

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Recurrence: (none)

Appointment

From: Ross, David P [ross.davidp@epa.gov]

Sent: 2/20/2019 8:40:23 PM

To: donp@fb.org

Subject: Meeting with Don Parrish

Location: 600 Maryland Ave SW, Washington DC 20024 Suite 1000W

Start: 2/21/2019 3:00:00 PM **End**: 2/21/2019 3:45:00 PM

Show Time As: Busy

Recurrence: (none)

Message

From: Lee Bridgett [leeb@fb.org]
Sent: 7/19/2018 8:55:18 PM

To: Ross, David P [ross.davidp@epa.gov]

Subject: Thank You for Speaking to the American Farm Bureau Federation's Council of Presidents

Attachments: 2018.07.19 David Ross Thank You Letter.pdf

Mr. Ross,

Please see the attached letter from American Farm Bureau Federation President Zippy Duvall, thanking you for taking the time to speak at the AFBF Council of President's meeting last week.

Best Regards,

Lee Bridgett

Administrative Assistant, Public Affairs



Washington, DC 20024
Phone: 202-406-3627 | Email: LeeB@fb.org | www.fb.org

July 19, 2018

The Honorable David Ross Assistant Administrator, Office of Water U.S. Environmental Protection Agency 1200 Pennsylvania Ave. NW Washington, DC 20460

Dear David:

I wanted to express my appreciation for the time and effort you took to speak to the American Farm Bureau Federation's Council of Presidents. It was evident from your remarks that you are dedicated to leading the Environmental Protection Agency's Office of Water. We are very fortunate to have a public servant with your expertise in that position.

As president of the nation's largest general farm organization, I appreciate your message of collaboration and willingness to work with agriculture. What a breath of fresh air! My staff and the staff of our state Farm Bureau organizations look forward to working with you and your office to make progress on the many important issues you mentioned in your presentation.

We are committed to working with you to find solutions that protect our environment while enabling our farmer members to sustainably produce an abundant supply of affordable food, fiber and fuel. Our state Farm Bureau presidents really appreciated your comments on WOTUS, groundwater connections and nutrients.

Given the important challenges we face, our industry greatly values having someone with your knowledge and experience working with us to find lasting and practical solutions. We trust your counsel, and we appreciate your leadership. Thank you for taking the time out of your busy schedule to speak with us.

Sincerely,

Zippy Duvall President

by Livell

Message

From: Michael Formica [formicam@nppc.org]

Sent: 2/27/2018 6:20:01 PM

To: Ross, David P [ross.davidp@epa.gov]

Subject: Brad McKinney

Attachments: McKinney, Bradley - Resume.pdf

David

Congrats on getting confirmed as AA for Water. Was great to see you yesterday at Matt's swearing in ceremony.

Thanks again for participating on the ANPC call the other day. Sorry I wasn't able to participate on the call, but had a different (non environment) issue arise that's taking up lots of my time.

As I mentioned, I've been trying to help Brad McKinney (son of USDA's Undersecretary for Trade) land a spot with the Administration, preferably at EPA. While he isn't a lawyer, Brad's got good general experience in and around DC in agricultural policy (including a stint working for Andy Wheeler at Faegre Baker) and would be a great fit for your team (or elsewhere at EPA) as it continues to focus on the challenges posed by nutrients and engages with the larger ag community and USDA. His resume is attached for your review.

Thanks again.

Michael C. Formica A.V.P. & Legal Counsel, Domestic Policy National Pork Producers Council 202.680.3820

Message

From: Don Parrish [donp@fb.org]
Sent: 10/12/2018 10:04:56 PM

To: Northey, Bill - OSEC, Washington, DC [Bill.Northey@osec.usda.gov]

CC: Aguero, Michael - OSEC, Washington, DC [Michael.Aguero@osec.usda.gov]; Ross, David P [ross.davidp@epa.gov];

Wildeman, Anna [wildeman.anna@epa.gov]; CloverAdams, Jamie - OSEC, Washington, DC

[Jamie.CloverAdams@osec.usda.gov]; Fisher, Andrew D - Washington, DC [Andrew.Fisher@osec.usda.gov]

Subject: Re: Meeting Request - Nutrient Loss

Thanks Bill - I will work with Michael next week.

Don

Sent from my iPhone

On Oct 12, 2018, at 5:20 PM, Northey, Bill - OSEC, Washington, DC <Bill.Northey@osec.usda.gov> wrote:

Don,

Please work with Michael to set up a meeting. I'd be quite interested in hearing your suggestions.

Thank you,

Bill

Bill Northey

USDA Under Secretary

Farm Production and Conservation: Natural Resources Conservation Service,

Farm Service Agency, Risk Management Agency

Executive Asst:
Michael Aguero
Michael Aguero@usda.gov

202-260-3276

From: Don Parrish < donp@fb.org > Sent: Friday, October 12, 2018 4:49 PM

To: Northey, Bill - OSEC, Washington, DC < Bill.Northey@osec.usda.gov>

Subject: Meeting Request - Nutrient Loss

Bill

I would like to request a meeting to discuss USDA's role in nutrient loss reduction strategies. Farm Bureau, The Fertilizer Institute, and two representatives from the Ag nutrient policy council would like to discuss the following topics with you, Anna Wildeman and David Ross from EPA.

- Major opportunity for USDA leadership in nutrient loss
- Explore opportunities to implement nutrient loss reduction practices using Farm Bill programs and
- Using USDA's leadership to engage state and local groups to aid in implementation of an overall nutrient strategy

If possible, I would like to suggest we can find time to meet before November 4th. Thanks and I look forward to hearing from you.

Don R. Parrish American Farm Bureau Federation donp@fb.org 202~406~3667

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Message

From: Lee Bridgett [leeb@fb.org]
Sent: 8/13/2018 9:16:54 PM

To: Ross, David P [ross.davidp@epa.gov]; Leopold, Matt (OGC) [Leopold.Matt@epa.gov]

Subject: AFBF Comments re: WOTUS and Recodification of Preexisting Rule

Attachments: AFBF SNPRM Comment (SWANCC).pdf; AFBF SNPRM Comment (Technical).pdf

Mr. Leopold and Mr. Ross,

Please see the attached comments filed today by the American Farm Bureau Federation along with several other organizations regarding the definition of "Waters of the United States" and recodification of the preexisting rule. (Docket ID EPA-HQ-OW-2017-0203-15104).

Thank you,

Lee Bridgett

Administrative Assistant, Public Affairs



600 Maryland Avenue SW, Suite 1000W Washington, DC 20024

Phone: 202-406-3627 | Email: <u>LeeB@fb.org</u> | <u>www.fb.org</u>

August 13, 2018

Submitted via regulations.gov

The Honorable Andrew Wheeler Acting Administrator Environmental Protection Agency 1200 Pennsylvania Avenue, NW Washington, DC 20460 The Honorable R.D. James Assistant Secretary of the Army (Civil Works) U.S. Department of the Army 108 Army Pentagon Washington, DC 20310

Re: Definition of "Waters of the United States"—Recodification of Preexisting Rule; Supplemental Notice of Proposed Rulemaking, 83 Fed. Reg. 32,227 (July 12, 2018)

Dear Acting Administrator Wheeler and Assistant Secretary James:

The undersigned organizations support the Environmental Protection Agency's ("EPA") and the Army Corps of Engineers' ("Corps") proposal to repeal the 2015 Rule Defining Waters of the United States ("2015 Rule"), and many of us are submitting individual comment letters detailing our reasons for supporting the proposal. We write this letter to separately address an issue of particular importance to all of us: the effect of the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("SWANCC"). As EPA and the Corps move forward with this rulemaking, the agencies must recognize the limitations SWANCC imposes on jurisdiction.

In the Supplemental Notice, EPA and the Corps request comment on:

[W]hether the water features at issue in SWANCC or other similar water features could be deemed jurisdictional under the 2015 Rule, and whether such a determination is consistent with or otherwise well-within the agencies' statutory authority, would be unreasonable or go beyond the scope of the CWA, and is consistent with Justice Kennedy's significant nexus test expounded in Rapanos wherein he stated, '[b]ecause such a [significant] nexus was lacking with respect to isolated ponds, the [SWANCC] Court held that the plain text of the statute did not permit' the Corps to assert jurisdiction over them.

83 Fed. Reg. at 32,249 (quoting *Rapanos v. United States*, 547 U.S. 715, 767 (2006)) (emphasis added).

This request for comment warrants special attention because the assertion of jurisdiction over the isolated ponds at issue in *SWANCC* or other similar water features—under the 2015 Rule's theory of what constitutes a significant nexus or any other theory—is incompatible with the statutory text and Supreme Court precedent.

In *SWANCC*, the Supreme Court "read the statute as written" to hold that the Clean Water Act ("CWA") would not allow the assertion of jurisdiction over nonnavigable, isolated, intrastate

Honorable Andrew Wheeler and R.D. James August 13, 2018 Page 2

ponds located in northern Illinois. 531 U.S. at 174. The Court began its analysis by citing two key elements of the statutory text: *first*, Congress's choice to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority . . .", *id.* at 167 (quoting 33 U.S.C. § 1251(b)) and, *second*, the statute's key jurisdictional term—"navigable waters," defined to mean "the waters of the United States." 531 U.S. at 166, 167. Construing these provisions in light of its prior decision in *Riverside Bayview*, the Court held that "the text of the statute will not allow [the Court] to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water." *Id.* at 168. To hold otherwise would effectively read the term "navigable" out of the Act and strip it of any independent significance. *See id.* at 171-72.

The Court acknowledged its statements in *Riverside Bayview* that the term "navigable" was of "limited import" and that Congress intended "to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *SWANCC*, 531 U.S. at 167 (citing *United States v. Riverside Bayview Homes*, 474 U.S. 121, 133 (1985)). But "it is one thing to give a word limited effect and quite another to give it no effect whatever." *SWANCC*, 531 U.S. at 172. Its holding in *Riverside Bayview*, the Court explained, was based on "Congress's unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands inseparably bound up with the 'waters' of the United States." *SWANCC*, 531 U.S. at 167, 172 (quoting *Riverside Bayview*, 474 U.S. at 133, 135-39).

The SWANCC court also considered the government's arguments based on legislative history and prior regulatory interpretations but found them unavailing. Among other things, it rejected the assertion that the 1977 legislative history indicates "that Congress recognized and accepted a broad definition of 'navigable waters' that includes nonnavigable, isolated, intrastate waters." 531 U.S. at 169. Government counsel at oral argument had conceded that a ruling upholding CWA jurisdiction over the SWANCC ponds would "assume that 'the use of the word navigable in the statute . . . does not have any independent significance." Id. at 172. But this was a bridge too far. The Court explained that the term "navigable waters" and the legislative history indicate that when Congress passed the CWA it was exercising its commerce power over navigation and had in mind its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." Id. at 168 n.3, 172. Because the jurisdictional claim in SWANCC would "read the term 'navigable waters' out of the statute," it exceeded the Corps' CWA authority. Id. at 172.

Not only did *SWANCC* emphasize the importance of the term "navigable" in the CWA's text, it explicitly reversed the lower court's holding that the CWA reaches as many waters as the Commerce Clause allows. *See* 531 U.S. at 166 (quoting from 191 F.3d 845, 850-52 (7th Cir. 1999)). Responding to the government's argument that its jurisdictional claims could be upheld based on "Congress's power to regulate intrastate activities that 'substantially affect' interstate commerce," *SWANCC*, 531 U.S. at 173, the Court noted that allowing the government to "claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use. Such an interpretation, pushing the limits of Congressional authority, could only be upheld if there were "a clear statement from Congress that it intended such a result." *Id.* at 174.

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"Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources." *Id.* (quoting 33 U.S.C. § 1251(b)). Consequently, the Court "read the statue as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject[ed] the request for administrative deference." *SWANCC*, 531 U.S. at 174.

The holding in SWANCC is not limited to the particular isolated, intrastate water features or the Migratory Bird Rule that were before the Court. Rather, it applies with equal force to any interpretation of CWA jurisdiction. In adopting a rule to define the "waters of the United States," the Agencies must give independent significance to the term "navigable" as Congress intended and respect the limits of federal authority that flow from Congress's explicit choice to preserve and protect the States' traditional and primary authority over land and water use. A core holding in SWANCC is that, absent a clear statement of Congressional intent, the CWA must be construed to avoid federal intrusion into State authority over land and water use. The assertion of jurisdiction over the very ponds at issue in SWANCC under some alternative theory would be incompatible with that holding. Thus, SWANCC does not allow for that. Neither does Justice Kennedy's concurrence in *Rapanos*. Reaffirming the holding in *SWANCC*, Justice Kennedy explained that the plain text of the CWA did not permit the Corps to assert jurisdiction over waters "that were isolated in the sense of being unconnected to other waters covered by the Act" and hence, lacked the sort of significant nexus to navigable waters that informed the Court's reading of the Act in Riverside Bayview. 547 U.S. at 766-67; see also id. at 779, 781-82, 784-85 (emphasizing that the significant nexus must be to navigable waters "in the traditional sense" or "as traditionally understood").

In short, any attempt to reassert jurisdiction over the *SWANCC* ponds and comparable water features would violate the plain text of the CWA, be contrary to Supreme Court jurisprudence construing the Act, impermissibly intrude on the states' traditional and primary authority over land and water use, and raise serious constitutional and federalism questions.

* * *

The undersigned organizations urge the agencies to finalize the proposed repeal of the 2015 Rule. As part of that rulemaking process, the agencies should recognize the breadth and import of the Court's holdings and rationales in *SWANCC* and avoid asserting CWA jurisdiction in any manner that contravenes that precedent.

American Farm Bureau Federation
Agri-Mark, Inc.
Agricultural Retailers Association
AKSARBEN Club Managers Association
American Dairy Coalition
American Exploration & Mining Association
American Exploration & Production Council
American Mosquito Control Association
American Petroleum Institute

Honorable Andrew Wheeler and R.D. James August 13, 2018

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American Public Power Association

American Sugar Cane League

American Sugarbeet Growers Association

Americans for Prosperity

Aquatic Plant Management Society

Arizona Cotton Growers Association

Arizona Farm Bureau Federation

Arizona Pork Council

Associated Builders and Contractors

Associated General Contractors of America

Association of General Contractors - Nebraska Chapter

California Citrus Quality Council

California Farm Bureau Federation

California Specialty Crops Council

Campaign for Liberty

Colorado Farm Bureau

Competitive Enterprise Institute

Council of Producers and Distributors of Agrotechnology

CropLife America

Dairy Producers of New Mexico

Dairy Producers of Utah

Edison Electric Institute

Exotic Wildlife Association

Farm Credit Services of America

Florida Farm Bureau Federation

FreedomWorks

Global Gold Chain Alliance

Golf Course Superintendents Association

GROWMARK, Inc.

Idaho Dairymen's Association

Idaho Farm Bureau Federation

Illinois Farm Bureau

Independent Petroleum Association of America

Independent Women's Forum

Industrial Minerals Association - North America

Iowa Farm Bureau Federation

Iowa-Nebraska Equipment Dealers Association

Kansas Farm Bureau

Michigan Farm Bureau

Minnesota Agricultural Water Resource Center

Minnesota Farm Bureau Federation

Mississippi Farm Bureau Federation

Missouri Dairy Association

Montana Farm Bureau Federation

National Alliance of Forest Owners

Honorable Andrew Wheeler and R.D. James

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National Alliance of Independent Crop Consultants

National Association of Home Builders

National Association of Landscape Professionals

National Association of Manufacturers

National Association of State Departments of Agriculture

National Association of Wheat Growers

National Cattlemen's Beef Association

National Chicken Council

National Club Association

National Corn Growers Association

National Cotton Council

National Council of Farmer Cooperatives

National Federation of Independent Businesses/Nebraska

National Industrial Sand Association

National Milk Producers Federation

National Mining Association

National Onion Association

National Pork Producers Council

National Ready Mixed Concrete Association

National Renderers Association

National Sorghum Producers

National Stone, Sand & Gravel Association

National Turkey Federation

Nebraska Agribusiness Association

Nebraska Association of County Officials

Nebraska Association of Resource Districts

Nebraska Bankers Association

Nebraska Cattlemen

Nebraska Chamber of Commerce and Industry

Nebraska Cooperative Council

Nebraska Corn Board

Nebraska Corn Growers Association

Nebraska Farm Bureau Federation

Nebraska Golf Course Managers Association

Nebraska Grain and Feed Association

Nebraska Grain Sorghum Association

Nebraska Pork Producers Association

Nebraska Poultry Industries

Nebraska Rural Electric Association

Nebraska Soybean Association

Nebraska State Dairy Association

Nebraska State Home Builders Association

Nebraska State Irrigation Association

Nebraska Water Resources Association

Nebraska Wheat Growers Association

Honorable Andrew Wheeler and R.D. James August 13, 2018 Page 6

Nemaha Natural Resources District

Nevada Farm Bureau Federation

New York Farm Bureau

North Carolina Farm Bureau

North Central Weed Science Society of America

Northeast Dairy Farmers Cooperatives

Northeastern Weed Science Society

Ohio AgriBusiness Association

Oklahoma Farm Bureau

Oregon Dairy Farmers Association

Pawnee County Rural Water District #1

Pennsylvania Farm Bureau

Professional Dairy Managers of Pennsylvania

Responsible Industry for a Sound Environment

South Dakota Agri-Business Association

Southern Weed Science Society

St. Albans Cooperative Creamery

Taxpayers Protection Alliance

Texas Association of Dairymen

Texas Cattle Feeders Association

Texas Wildlife Association

The Fertilizer Institute

The Society of American Florists

The Utility Water Act Group

Treated Wood Council

U.S. Chamber of Commerce

United Dairymen of Arizona

United Egg Producers

United States Cattlemen's Association

Upstate Niagara Cooperative, Inc.

U.S. Poultry & Egg Association

USA Rice

Virginia Agribusiness Council

Virginia Farm Bureau Federation

Virginia Poultry Federation

Washington State Dairy Federation

Weed Science Society of America

Western Society of Weed Science

Wyoming Ag-Business Association

Wyoming Farm Bureau Federation

CC: Matthew Z. Leopold, General Counsel, U.S. Environmental Protection Agency David Ross, Assistant Administrator for the Office of Water, U.S. Environmental Protection Agency

August 13, 2018

Submitted via www.regulations.gov

The Honorable Andrew Wheeler Acting Administrator Environmental Protection Agency 1200 Pennsylvania Avenue, NW Washington, DC 20460

The Honorable R.D. James Assistant Secretary of the Army (Civil Works) U.S. Department of the Army 108 Army Pentagon Washington, DC 20310

EPA-HQ-OW-2017-0203

Re: Definition of "Waters of the United States"—Recodification of Preexisting Rule; Supplemental Notice of Proposed Rulemaking, 83 Fed. Reg. 32,227 (July 12, 2018)

Dear Acting Administrator Wheeler and Assistant Secretary James:

The undersigned agricultural organizations appreciate the opportunity to provide additional comments on the U.S. Environmental Protection Agency's (EPA) and U.S. Army Corps of Engineers' (Corps) supplemental notice of proposed rulemaking, "Definition of 'Waters of the United States' – Recodification of Existing Rule," published at 83 Fed. Reg. 32,227 on July 12, 2018. Most of the undersigned organizations previously submitted comments in support of the Agencies' July 27, 2017, proposal to repeal the 2015 rule defining "waters of the United States" (hereinafter, "2015 Rule"). In these comments, we provide additional detailed reasons why we believe the Agencies should finalize their pending proposal to permanently repeal the 2015 Rule.

The undersigned organizations, or their members, own, operate, or have an interest in lands and facilities that produce or contribute to the production of the row crops, [forests,] livestock, and poultry that provide safe and affordable food, fiber, and fuel to Americans all across the United States. We and our members represent, own and operate facilities that are water-dependent enterprises. For that reason, we have a strong interest in protecting and restoring the Nation's wetlands and waters. Given the broad array of potentially jurisdictional water features that exist on the Nation's farm, ranch, and [forest] lands, clarity, predictability, and consistency is of the essence. Farmers, ranchers, and [foresters] need to know what features on their lands are subject to federal jurisdiction under the Clean Water Act (CWA) and, by extension, whether their day-to-day activities are lawful.

¹ 82 Fed. Reg. 34, 899 (July 27, 2017).

² 80 Fed. Reg. 37,054 (June 29, 2015).

The undersigned organizations remain concerned that the 2015 Rule expanded CWA jurisdiction well beyond the limits that Congress established, as interpreted and recognized by the Supreme Court. This unprecedented expansion readjusted the federal-state balance and, contrary to Congress's stated policy in the CWA, failed to recognize, preserve, and protect the states' traditional and primary authority over land and water use. Equally important, the 2015 Rule fell woefully short of meeting its stated objective of providing clarity and certainty regarding the scope of the CWA. Just the opposite, the rule is so unclear in its scope as to be unconstitutional. In particular, the Rule's definitions and discussions of certain key terms and concepts are vague in a way that violates the Fifth Amendment's Due Process Clause, while its purported scope improperly treads on the States' traditional prerogatives and violates the Commerce Clause because, to put it simply, there is nothing commercial about it.

These are not the only reasons for repealing the 2015 Rule, but they are more than sufficient to justify doing so. If the Agencies repeal the Rule, it will be replaced by the regulatory definitions that preceded it. Those preexisting regulations are far from perfect, and the undersigned organizations urge the Agencies to continue to engage stakeholders and develop a workable definition of WOTUS—one that not only respects the limits Congress placed on the CWA's scope, but that also takes account of the realities facing ordinary landowners. As an interim measure, however, reinstatement of the pre-2015 regulatory framework for defining "waters of the United States" is certainly preferable to the confusion and overreach that would result should the 2015 Rule become applicable in any states.

I. <u>Legal Background</u>

The CWA establishes multiple programs that, together, are designed to achieve the Act's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Among other things, the Act envisions that states will address water pollution through a variety of programs, funding, grants, research, training and many other measures, with differing levels of federal involvement. One of the Act's main provisions is Section 301(a), which prohibits the "discharge of any pollutant," defined as "any addition of any pollutant to navigable waters from any point source," except "in compliance with" other provisions of the Act.⁴ Notably, this discharge prohibition and the regulatory permitting programs in the Act (e.g., Sections 402 and 404) apply only to discharge[s] of pollutants" to "navigable waters," as opposed to all "pollution" of the "Nation's waters." That is not to say the Act leaves the rest of the nation's waters unprotected. Rather, Congress expressly "recognize[d]" and sought to "preserve and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution" and "plan the development and use" of "land and water resources" and thus, Congress left States and localities responsible for protecting all waters (including groundwater) and wetlands that are not "navigable waters." The distinction between navigable waters and the rest of the nation's waters is critically important: every expansion of federal

³ 33 U.S.C. 1251(a).

⁴ *Id.* §§ 1311(a), 1362(12).

⁵ *Id.* § 1362(12).

⁶ *Id.* § 1362(7).

⁷ *Id.* § 1362(19).

⁸ *Id.* § 1251(b).

jurisdiction—e.g., by broadly interpreting the term "navigable waters" in pursuit of the 101(a) objective—readjusts the federal-state balance that Congress struck in the Act. 9

In 1977, the Corps defined "waters of the United States" to include not only traditional navigable waters, but also "adjacent wetlands" and "[a]ll other waters" the "degradation or destruction of which could affect interstate commerce." Even though the text of the regulations remained largely unchanged for over three decades, the Agencies' interpretation and application of those regulations steadily expanded over time. On three separate occasions, the Supreme Court had to weigh in to address the government's efforts to bring more waters under federal jurisdiction.

First, in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), the Court addressed the question of whether non-navigable wetlands constitute "waters of the United States" where they are "adjacent to" navigable-in-fact waters and "inseparably bound up with" them because of their "significant effects on water quality and the aquatic ecosystem." Finding that Congress intended the CWA "to regulate at least *some* waters that would not be deemed 'navigable," the Court held that it is "a permissible interpretation of the Act" to conclude that "a wetland that *actually abuts on* a navigable waterway" fits within the "definition of 'waters of the United States." Notably, the Court's holding was based heavily on the fact that Congress unquestionably acquiesced to, and approved of, the Corps' regulations interpreting the CWA to encompass wetlands adjacent to navigable waters. ¹³

Second, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Court struck down the Migratory Bird Rule, which the Agencies used to assert jurisdiction over various features that bore little or no relation to traditional navigable waters. In that case, the Corps claimed jurisdiction over isolated "seasonally ponded, abandoned gravel mining depressions" because they were "used as habitat by [migratory] birds." The Supreme Court explained that, "to rule for [the agency], we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water," but "the text of the statute will not allow this." To hold otherwise would effectively read the term "navigable" out of the Act and strip it of any independent significance. The *SWANCC* court also held that allowing the government to "claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use," all without anything "approaching a clear statement from Congress that it intended" such a result." Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to

⁹ See Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, 172-74 (2001) (SWANCC).

¹⁰ 42 Fed. Reg. 37,122, 37,144 (July 19, 1977).

¹¹ 474 U.S. at 131-135 & n.9.

¹² *Id.* at 133, 135 (emphasis added).

¹³ *Id.* at 135-39 (discussing 1977 CWA amendments and legislative history).

¹⁴ 531 U.S. at 162-65 (quoting 51 Fed. Reg. 41,217 (Nov. 13, 1986)).

¹⁵ SWANCC, 531 U.S. at 168.

¹⁶ See id. at 171-72.

¹⁷ *Id.* at 174.

'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources." 18

Finally, in *Rapanos*, the Court dealt with the Corps' assertions of jurisdiction over sites containing "sometimes-saturated soil conditions," located twenty miles from "[t]he nearest body of navigable water." The Corps viewed those sites as adjacent wetlands because they were "near ditches or man-made drains that eventually empty into traditional navigable waters." Justice Scalia, writing for a four-Justice plurality, rejected the Corps' position, holding that "waters of the United States" include "only relatively permanent, standing or flowing bodies of water" and not "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." By treating "ephemeral streams" and "dry arroyos" as jurisdictional, the agencies had stretched the text of the CWA "beyond parody" to mean "Land is Waters." Moreover, under the plurality opinion, wetlands are jurisdictional based on adjacency "only [if they have] a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands." [A]n intermittent, physically remote connection" to navigable waters is not enough under either *Riverside Bayview* or *SWANCC*.²⁴

Justice Kennedy concurred in the judgment in *Rapanos*. In his opinion, "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense."²⁵ When "wetlands' effects on water quality [of traditional navigable waters] are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'"²⁶ While Justice Kennedy left open the possibility that this test "*may*" allow for the assertion of jurisdiction over a wetland abutting a major tributary to a traditional navigable water, he categorically rejected the idea that "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it" would satisfy his test for significant nexus.²⁷ He further suggested that any agency regulation identifying which tributaries are jurisdictional would need to rest on considerations including "volume of flow" and "proximity to navigable waters" "significant enough" to provide "assurance" that they and "wetlands adjacent to them" perform "important functions for an aquatic system incorporating navigable waters."²⁸

¹⁸ *Id.* (quoting 33 U.S.C. § 1251(b)).

¹⁹ 547 U.S. at 720-21.

²⁰ Id. at 729.

²¹ Rapanos, 547 U.S. at 732, 739.

²² *Id.* at 734.

²³ *Id.* at 742.

²⁴ *Id*.

²⁵ Id. at 779.

²⁶ *Id.* at 780.

²⁷ *Id.* at 781; *see also id.* at 778 (Act does not reach wetlands alongside "a ditch or drain" that is "remote or insubstantial" just because it "eventually may flow into traditional navigable waters").

²⁸ *Id.* at 781.

II. The Agencies Have Ample Legal Justification for Repealing the 2015 Rule.

The Agencies are rightly concerned that the "2015 Rule lacks sufficient statutory basis." As discussed in the supplemental notice, the 2015 Rule stretches the "significant nexus" concept so far as to be inconsistent with Justice Kennedy's concurring opinion in *Rapanos*, and that fundamental defect justifies repeal given that "significant nexus" is the backbone of the 2015 Rule's expansion of jurisdiction over tributaries (as newly defined), adjacent waters and wetlands, and various other waters. But that is just the tip of the iceberg. As explained in the following sections, there are many more reasons why the Agencies should repeal the 2015 Rule.

A. The 2015 Rule Improperly Treats Justice Kennedy's Concurring Opinion in *Rapanos* as Controlling.

The 2015 Rule characterized Justice Kennedy's "significant nexus" test for what constitutes jurisdictional wetlands "as the touchstone" for CWA jurisdiction and then applied it "to other categories of water bodies." But Justice Kennedy's opinion, which no other justice joined, was not the holding of *Rapanos*. Because the 2015 Rule is based explicitly on that opinion, it is unlawful and must be repealed.

Courts have struggled with how to interpret the 4-1-4 decision in *Rapanos* given that no rationale supporting the judgment enjoyed support from a majority of the Justices. The Supreme Court's decision in *Marks v. United States* provides some guidance on interpreting fractured decisions such as *Rapanos*.³² There, the Court held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." But this holding has been of limited help in interpreting *Rapanos*, because neither the plurality opinion nor Justice Kennedy's concurrence is a logical subset of the other.³⁴

Simply put, "there is quite little common ground between Justice Kennedy's and the plurality's conceptions of jurisdiction under the Act, and both flatly reject the other's views." Faced with this dilemma, when crafting the 2015 Rule (or any future definition of "waters of the United States"), the Agencies had several options to choose from in determining the scope of the "waters of the United States":

Waters must satisfy both the plurality and Justice Kennedy's opinions. Under this approach, only those waters that satisfy both opinions would be jurisdictional because that is the

²⁹ 83 Fed. Reg. at 32,238.

³⁰ See id. at 32,240-42.

³¹ See 79 Fed. Reg. at 22,192.

³² 430 U.S. 188 (1977).

³³ Id. at 193.

³⁴ See United States v. Cundiff, 555 F.3d 200, 209 (6th Cir. 2009) (explaining how the search for the "narrowest opinion" in Rapanos that "relies on the least doctrinally far-reaching common ground" "breaks down" in the Rapanos context because neither opinion is a "logical subset" of the other); see also Nichols v. United States 511 U.S. 738, 745 (1994) (declining to apply Marks because "[a] number of Courts of Appeals have decided there is no lowest common denominator or 'narrowest grounds' that represents the Court's holding").

³⁵ Cundiff, 555 F.3d at 210.

narrowest "position" taken by the opinions, read together, of the Justices who concurred in the judgment. *Rapanos* would therefore require that: (i) jurisdictional waters have a relatively permanent flow that reaches traditional navigable water; (ii) wetlands have a continuous surface connection to navigable waters; and (iii) the flow or connection must be sufficient in frequency, duration, and proximity to affect the chemical, physical, and biological integrity of covered waters.

Waters must satisfy points of agreement between the two opinions. The five Justices who concurred in the judgment in *Rapanos* shared the same view on some important issues. For instance, both opinions held that "the word 'navigable' in 'navigable waters [must] be given some importance." Both opinions also agree that the term "navigable waters" encompasses some waters and wetlands that are not navigable-in-fact but that have a substantial connection to navigable waters. Finally, both opinions agree that "waters of the United States" do *not* include "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it," much less the waters or "wetlands [that] lie alongside [such] a ditch or drain." Under this approach, the foregoing are the controlling holdings of *Rapanos* that bind the Agencies.

Treat the majority opinions as persuasive authority. Under this approach, the plurality and Kennedy opinions would be deemed persuasive authority that must be considered in conjunction with other binding precedent such as *SWANCC* and *Riverside Bayview*. Neither the plurality nor the Kennedy opinion, by itself, would be deemed to have superseded any of the authoritative holdings in either of those earlier cases. Nor would either opinion be treated as controlling.

Had the Agencies taken any of these three approaches, the 2015 Rule would have been compatible with *Marks*. What the Agencies could not do, however, was to proclaim that waters that satisfy only Justice Kennedy's concurring opinion are jurisdictional. That opinion clearly is not the narrowest reading of the *Rapanos* majority opinions. Nor is it permissible to conclude that "waters of the United States" are those waters that meet either the plurality or the Kennedy opinion. Such a conclusion ignores the principle in *Marks* that the holding of the Supreme Court is the "position taken by those Members who concurred in the judgments on the narrowest grounds." Because the 2015 Rule was based on the faulty legal premise that Justice Kennedy's opinion is the "touchstone" of jurisdiction, it must be repealed.

One final point deserves mention. Amidst all of the confusion over how to apply *Marks* to interpret the *Rapanos* decision, at least one thing is clear: dissenting opinions are not entitled to any weight. As the Supreme Court explained in *O'Dell v. Netherland*, *Marks* requires a court to identify "the narrowest grounds of decision among the Justices *whose votes were necessary to the judgment*." Courts of appeals have similarly interpreted *Marks* to mean that dissenting opinions carry no precedential value. The Sixth Circuit explained that *Marks* "instruct[ed] lower

³⁶ Rapanos, 547 U.S. at 778 (Kennedy); id. at 731 (plurality).

³⁷ See 547 U.S. at 739, 742 (plurality); id. at 784-85 (Kennedy).

³⁸ *Id.* at 781 (Kennedy); 733-34 (plurality).

³⁹ Id at 193

⁴⁰ 521 U.S. 151, 160 (1997) (emphasis added).

courts . . . to ignore dissents."⁴¹ Likewise, the Ninth Circuit recently proclaimed that "the dissent that did not support the judgment is out."⁴² And the Seventh Circuit cautioned that "under *Marks*, the positions of those Justices who *dissented* from the judgment are not counted in trying to discern a governing holding from divided opinions."⁴³ To sum up, in the words of the D.C. Circuit sitting *en banc*, ⁴⁴ courts cannot "combine a dissent with a concurrence to form a *Marks* majority."

Despite these holdings, the 2015 Rule improperly looked to the *Rapanos* dissent for support. For example, the Technical Support Document (at 51) makes no secret that the agencies looked "to the votes of the dissenting Justices" to stitch together "a majority view." And to support its adoption of Justice Kennedy's "significant nexus" test over the plurality view, the final rule cites the *Rapanos* dissent as support for the notion that the Agencies were free to follow either the plurality or the concurring opinion. For these reasons, the 2015 Rule's reliance on the *Rapanos* dissent was unlawful.

B. The 2015 Rule Exceeds the Agencies' CWA Authority and is Contrary to Supreme Court Precedent and Science.

1. The Rule reads the term "navigable" out of the CWA.

The CWA grants the Agencies jurisdiction over "navigable waters," which are defined as "the waters of the United States." In *SWANCC*, the Supreme Court explained that "Congress' separate definitional use of the phrase 'waters of the United States' [does not] constitute[] a basis for reading the term 'navigable waters' out of the statute." While the Court acknowledged its prior statement in *Riverside Bayview* that "the word 'navigable' in the statute" may have "limited effect," it clarified in *SWANCC* that the word "has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." The Court also found nothing in the legislative history that "signifies that Congress intended to exert anything more than its commerce power over navigation." ⁵⁰

In *Rapanos*, both the plurality opinion and Justice Kennedy's concurrence again recognized the need to give the term "navigable" some effect.⁵¹ Justice Kennedy, in particular, stated that "the word 'navigable'" must "be given some importance," and he emphasized that if jurisdiction over wetlands is to be based on a "significant nexus" test, the nexus must be to "navigable waters *in the traditional sense*." For that reason, the CWA cannot be understood to

⁴¹ Cundiff, 555 F.3d at 208.

⁴² United States v. Robertson, 875 F.3d 1281, 1292 (9th Cir. 2017).

⁴³ Gibson v. Am. Cyanamid Co., 760 F.3d 600, 620 (7th Cir. 2014).

⁴⁴ King v. Palmer, 950 F.2d 771, 783 (D.C. Cir. 1991) (en banc).

⁴⁵ See also 79 Fed. Reg. at 22,260 (endorsing the dissent's view of adjacency).

⁴⁶ See 80 Fed. Reg. at 37,061.

⁴⁷ See 33 U.S.C. §§ 1311(a), 1362(12).

⁴⁸ 531 U.S. at 172.

⁴⁹ *Id.* at 172-73 (citing *Riverside Bayview*, 474 U.S. at 133).

⁵⁰ *Id*. at 168 n.3.

⁵¹ 547 U.S. at 734-35 (plurality); *id.* at 778-79.

⁵² *Id.* at 778-79.

"permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters." ⁵³

The 2015 Rule flouts these important precedents. It asserts federal jurisdiction over a wide variety of normally dry land features (as "tributaries") and nearby isolated water features (as "adjacent" or case-by-case "significant nexus" waters). Such water features are not navigable in any sense of the word and cannot reasonably be so made. And many of the features that would be jurisdictional under the rule bear no relationship to any navigable water and do not abut or contribute flow to any navigable water. By subjecting these sorts of water features to federal jurisdiction, the 2015 Rule impermissibly reads the term "navigable" out of the CWA.

Perhaps the most obvious examples of how the 2015 Rule ignores the statutory text are the "seasonally ponded, abandoned gravel mining depressions" that were at issue in *SWANCC*.⁵⁴ A majority of the Supreme Court agreed that those "nonnavigable, isolated, intrastate waters" are not within the scope of federal jurisdiction under the CWA; by the very same features could be jurisdictional under the 2015 Rule. Those depressions are within 4,000 feet of Poplar Creek, a tributary to the navigable Fox River. And there can be little doubt that the Corps would find the existence of a significant nexus to the Fox River because the depressions retain water and may have the ability to store runoff or contribute other ecological functions in the watershed. The 2015 Rule's expansive view of "significant nexus" would therefore improperly gut the holding in *SWANCC* by doing exactly what the Court held was unlawful: read the term "navigable" out of the text and open the door to a significant impingement upon the States' traditional and primary authority over land and water use without a clear statement authorizing such a readjustment of the federal-state balance. Thus, the Agencies must repeal the rule.

2. The 2015 Rule's overbroad definition of "tributaries" finds no support in law or science.

The 2015 Rule introduced a new definition of "tributary" that was among the most expansive and problematic terms in the rule. The rule defined "tributary" to mean any feature contributing any minimal amount of flow to a category (1)-(3) water, "either directly or through another water," and "characterized by the presence of physical indicators of a bed and banks and an ordinary high water mark." Under this definition, ephemeral drainages, minor creek beds, and other features that are dry for months, years, or even decades can be jurisdictional so long as they exhibit physical indicators of a bed, banks, and an ordinary high water mark. Features can be jurisdictional as tributaries even if they pass "through any number of [non-jurisdictional] downstream waters" or natural or man-made physical interruptions (*e.g.*, culverts, dams, debris

⁵³ *Id.* at 778.

⁵⁴ 531 U.S. at 164.

⁵⁵ *Id.* at 169; *see also Rapanos*, 547 U.S. at 767 (Kennedy) (concluding that "[b]ecause such a [significant] nexus was lacking with respect to isolated ponds, the [SWANCC] Court held that the plain text of the statute did not permit" the assertion of jurisdiction over them).

⁵⁶ See 83 Fed. Reg. at 32,249.

⁵⁷ See 531 U.S. at 171-74.

⁵⁸ 33 C.F.R. § 328.3(c)(3); see also 80 Fed. Reg. at 37,076 (stating that flow can be "intermittent or ephemeral").

piles, boulder fields, or underground features) *of any length*, so long as a bed, banks, and ordinary high water mark can be identified upstream of the break.⁵⁹

To make matters worse, under the 2015 Rule, regulators could conclusively establish the presence of both "waters" and "physical indicators of a bed and banks and ordinary high water" using desktop tools. ⁶⁰ Specifically, the Agencies can rely on "[o]ther evidence, besides direct field observation," such as "remote sensing or mapping information," including "USGS topographic data, the USGS National Hydrography Dataset (NHD), Natural Resources Conservation Services (NRCS) Soil Surveys, and State or local stream maps, as well as the analysis of aerial photographs, and light detection and ranging (also known as LIDAR) data, and desktop tools that provide for the hydrologic estimation of a discharge sufficient to create an ordinary high water mark, such as a regional regression analysis or hydrologic modeling." ⁶¹ And in establishing the presence of tributaries, the Agencies may use historical information alone. The preamble to the 2015 Rule asserted that where remote sensing and other desktop tools indicate a prior existence of a bed, banks, and an ordinary high water mark, that is enough to establish jurisdiction, even if those features do not even exist on the landscape today. ⁶²

The 2015 Rule's heavy reliance on the ordinary high water mark is extremely problematic. The rule defines ordinary high water mark to mean "that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas." That is the same definition that Justice Kennedy criticized in *Rapanos* as too uncertain and attenuated to serve as the "determinative measure" for identifying waters of the United States. Because an ordinary high water mark is an uncertain indicator of "volume and regularity of flow," it brings within the Agencies' jurisdiction "remote" features with only "minor" connections to navigable waters—features that "in many cases" are "little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*." The surface of the value of th

The record confirms that the definition of "tributary" in the 2015 Rule reaches way too far, covering countless miles of previously unregulated features. ⁶⁶ Not only is the geographic breadth and issue, the rule establishes categorical jurisdiction over many isolated, often dry land features regardless of their distance to navigable waters or whether "their effects on water quality are speculative or insubstantial." ⁶⁷ Although Justice Kennedy contemplated that it might be permissible for the Agencies to promulgate a rule that "identif[ies] categories of tributaries" (and

⁵⁹ 33 C.F.R. § 328.3(c)(3).

⁶⁰ See 80 Fed. Reg. at 37,081, 37,098.

⁶¹ *Id.* at 37,076-77.

⁶² *Id.* at 37,077.

⁶³ Id. at 37,106.

^{64 547} U.S. at 781.

⁶⁵ *Id.* at 781-782 (Kennedy, J.).

⁶⁶ See, e.g., NAHB Comments 56-59, 121-123, ID-19574 (JA__) (the Rule will extend jurisdiction over nearly 100,000 miles of intermittent and ephemeral drainages in each of Kansas and Missouri alone); Waters Working Group Comments 27, ID-19529 (JA__) (water supply systems and municipal separate storm sewer systems); Comments of Delta County, Colorado 3, ID-14405 (JA__) ("artificial stock ponds west of the Mississippi").

⁶⁷ Rapanos, 547 U.S. at 780 (Kennedy).

adjacent wetlands) that, due to "volume of flow," "proximity to navigable waters," and other relevant considerations "are significant enough" to support federal jurisdiction, ⁶⁸ the 2015 Rule did not do that. Rather than provide for consideration of frequency and volume of flow or proximity to navigable waters, the 2015 Rule proclaims that the presence of "physical indicators" of bed and banks and ordinary high water mark *guarantee* there will be a significant nexus to navigable waters. ⁶⁹ But those physical indicators do no such thing. To use an example, many ephemeral washes in Maricopa County, Arizona experience flow infrequently, sometimes less than once per year, with each flow event lasting less than five hours. Perhaps not surprisingly, the Corps has previously found that many such washes *do not* have a significant nexus following case-specific analyses, even though these washes often exhibit physical indicators of an ordinary high water mark and therefore would be treated under the 2015 Rule as jurisdictional tributaries. ⁷⁰

Not only is the 2015 Rule's definition of "tributary" contrary to law, it also lacks scientific support. As noted above, the rule places heavy emphasis on the ordinary high water mark. According to the technical support document, an ordinary high water mark "forms due to some regularity of flow and does not occur due to extraordinary events."71 The assumption is that if such a mark is present, a water feature with relatively constant and significant water flow must also be present. This is simply not true. The Agencies made an important concession in promulgating the 2015 Rule: the jurisdictional status of some tributaries—especially "intermittent and ephemeral" features that may not experience flow for months and years at a time—has long been "called into question," and the evidence of connectivity for such features is "less abundant" than for perennial features in water-rich regions. 73 Once again, the arid West provides an important case study. In that region, erosional features with beds, banks, and ordinary high water marks often reflect one-time, extreme water events, and are not reliable indicators of regular flow. 74 Because rainfall occurs infrequently, and because sandy, lightlyvegetated soils are highly erodible, washes, arroyos, and other erosional features often reflect physical indicators of a bed, banks, and an ordinary high water mark, even though they were formed by a long-past and short-lived flood event, and the topography has persisted for years or even decades without again experiencing flow.⁷⁵

Given these conditions, it comes as no surprise that the Corps' studies have found "no direct correlation" between the location of ordinary high water mark indicators and future water flow in arid regions. ⁷⁶ In fact, such "indicators are distributed randomly throughout the [arid] landscape and are not related to specific channel characteristics." For obvious reasons, "randomly" distributed indicators cannot provide a rational basis for a finding that all features

⁶⁸ *Id.* at 780-81.

⁶⁹ See 80 Fed. Reg. at 37,076.

⁷⁰ See City of Scottsdale Comments 2-3.

⁷¹ TSD at 239.

⁷² 79 Fed. Reg. at 22,231.

⁷³ 80 Fed. Reg. at 37,079.

⁷⁴ See Ariz. Mining Ass'n Comments at 7-11.

⁷⁵ See Barrick Gold Comments at 15-16.

⁷⁶ See Ariz. Mining Ass'n Comments 10-11 (quoting U.S. Army Corps of Eng'rs, *Distribution of Ordinary High Water Mark (OHWM) Indicators and Their Reliability* 14 (2006)).

⁷⁷ Id. at 11 (quoting U.S. Army Corps of Eng'rs, Survey of OHWM Indicator Distribution Patterns Across Arid West Landscapes 17 (2013)).

that satisfy the definition of "tributary" automatically meet the "significant nexus" standard set forth in the rule.

The Agencies relied almost exclusively on a case study of the San Pedro River to justify the breadth of the "tributary" definition and its application to arid parts of the country. But that river is *not* representative of arid regions nationwide. Although the Connectivity Report claims that characteristics "similar to the San Pedro River" "have been observed in [three] other southwestern rivers," it candidly acknowledges that each of those systems has *more* flow than the San Pedro. To put things in perspective, the mainstem San Pedro has surface flows 261 days a year because its tributaries generate large storm water runoff, due to unusual soil composition that prevents water loss. By contrast, the Santa Cruz River, which is typical of features in arid parts of the country, has a median annual flow of *zero* cubic feet per second, is dry 90% of the time, and is part of a system of "tributaries" that generally have less frequent surface flow than the mainstem channel, "behave more like deep sandboxes than streams," and lack surface flow or a shallow subsurface connection to groundwater. The Agencies' heavy reliance on the San Pedro consequently overstated the connections between arid channels and downstream navigable waters and was thus arbitrary.

3. The 2015 Rule's definition of "adjacent" is similarly flawed.

The 2015 Rule defines "adjacent" as "bordering, contiguous, or neighboring." The term "neighboring" is defined to include, among other things, (i) waters within 100 feet of the ordinary high water mark of a navigable water or tributary, and (ii) waters within the 100-year floodplain of such a water and within 1,500 feet of its ordinary high water mark.⁸³ This definition conflicts with Supreme Court precedent and lacks record support.

The Supreme Court has consistently given the term "adjacent" its ordinary meaning in interpreting the CWA. In *Riverside Bayview*, the Court described "wetlands adjacent to [jurisdictional] bodies of water" as wetlands "adjoining" and "actually abut[ting] on" a traditional "navigable waterway." To be jurisdictional, adjacent wetlands must be "inseparably bound up with the 'waters' of the United States" and not meaningfully distinguishable from them. Many years in later in *SWANCC*, the Court rejected the Corps' assertion of jurisdiction over *isolated* non-navigable waters "that [we]re *not* adjacent to open water" and thus not "inseparably bound up" with "navigable waters." Finally, in *Rapanos*, the plurality opinion explained that "[h]owever ambiguous the term may be in the abstract, as we have explained earlier, 'adjacent' as used in *Riverside Bayview* is not ambiguous between 'physically abutting' and merely 'nearby." Despite these holdings, the 2015 Rule nevertheless interprets the word

⁷⁸ See 79 Fed. Reg. at 22,231-22,232; see also Connectivity Report at B-37, B-55.

⁷⁹ See, e.g., Southwest Developers Comments 2 (of "1,016 publications" in the Draft Connectivity Report, "only three include research on arid west headwaters in small watersheds").

⁸⁰ Connectivity Report B-48 to B-49.

⁸¹ See Freeport-McMoRan Comments 6.

⁸² See id.; Freeport-McMoRan Technical Comments 4, 12-15.

^{83 33} C.F.R. § 328.3(c)(2).

^{84 474} U.S. at 135.

⁸⁵ Id. at 134-35 & n. 9.

^{86 531} U.S. at 167-68, 171.

^{87 547} U.S. at 748.

"adjacent" to encompass "nearby" waters based on notions of "functional relatedness," rather than physical and geographical proximity, thereby extending the meaning of the word beyond reason.

The 2015 Rule even violates Justice Kennedy's concurring opinion in *Rapanos* by asserting jurisdiction based on adjacency to not just navigable waters in the traditional sense, but also to any category (1) through (5) feature, including "tributaries" with only ephemeral flow. Justice Kennedy, however, plainly rejected the notion that a wetland's mere adjacency to a minor tributary could be "the determinative measure" of whether it was "likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood." [W] etlands adjacent to [such] tributaries," Justice Kennedy explained, "might appear little more related to navigable-in-fact waters than were the isolated ponds [in *SWANCC*]." For that reason, Justice Kennedy voted to vacate the agencies' assertion of jurisdiction over wetlands supposedly "adjacent" to a ditch that indirectly fed into a navigable lake. Simply put, "mere adjacency to a tributary of this sort is insufficient." Seemingly ignoring these discussions in Justice Kennedy's opinion, the 2015 Rule categorically asserts jurisdiction over any waters based on their "adjacency" to "tributaries" "however remote and insubstantial, including ephemeral features, drains, ditches, and streams remote from navigable waters.

Moreover, although the Supreme Court has never allowed such an approach, the 2015 Rule asserts jurisdiction not only on just adjacent "wetlands," but all other adjacent "waters." This novel expansion is unjustified. As the *Rapanos* plurality explained, *non-wetland* "waters"—especially those separated from traditional navigable waters by physical barriers or significant distances—"do not implicate the boundary-drawing problem" that made it appropriate to defer to the Corps' approach to adjacency in *Riverside Bayview*. Tellingly, lower courts have rejected similar attempts to assert "adjacency" jurisdiction over non-wetlands. For example, the Ninth Circuit rejected jurisdiction over an isolated pond located within 125 feet of a navigable tributary of San Francisco Bay. In so holding, the Court explained that any nexus between the pond and the tributary "falls far short of the nexus that Justice Kennedy required in *Rapanos*." The 2015 Rule, however, would assert jurisdiction over that pond and countless others like it due to the expansive definitions of "adjacent" and "significant nexus."

Finally, the 2015 Rule improperly defines "adjacency" with reference to "the 100-year floodplain." Such a standard flouts the "continuous surface connection" required by the Rapanos plurality. Fequally problematic, a water that is merely located within the 100-year floodplain of a navigable water is so rarely connected to that navigable water that it cannot be said to "significantly affect the chemical, physical, and biological integrity of the other covered

⁸⁸ Id. at 781.

⁸⁹ *Id.* at 781-782.

⁹⁰ Id. at 764; accord id. at 730 (plurality).

⁹¹ Id. at 786.

⁹² *Id.* at 764 (Kennedy).

⁹³ 547 U.S. at 742.

⁹⁴ See S.F. Baykeeper v. Cargill Salt Div., 481 F.3d 700, 708 (9th Cir. 2007).

⁹⁵ Id.

⁹⁶ 33 C.F.R. § 328.3(c)(2)(ii).

⁹⁷ See 547 U.S. at 742.

water[]."98 At most, such a water would have an "insubstantial" "effect[] on water quality" that "fall[s] outside the zone fairly encompassed by the statutory term 'navigable waters.""99

4. The 2015 Rule defines "significant nexus" so broadly that it revives the defunct Migratory Bird Rule.

In addition to categorically asserting jurisdiction over various types of water bodies, the 2015 Rule allows for case-by-case assertions of jurisdiction over additional water features that meet the rule's definition of "significant nexus." Because the rule's definition of that term goes far beyond what *SWANCC* or Justice Kennedy's concurrence in *Rapanos* envisioned, the rule is unlawful and needs to be repealed.

Justice Kennedy looked to the concept of "significant nexus" "to give the term 'navigable' some meaning" by limiting federal jurisdiction to wetlands (not all waters) with a significant impact on traditional navigable waters. ¹⁰⁰ In his view, a water feature is jurisdictional only if it "significantly affect[s] the chemical, physical, and biological integrity of ... waters more readily understood as 'navigable.'" ¹⁰¹ Justice Kennedy believed his "significant nexus" test provides assurance that the CWA's jurisdiction would not extend to features that are too "remote" or whose "effects on [navigable] water quality are speculative or insubstantial." ¹⁰²

The "significant nexus" standard in the 2015 Rule does not provide such assurance. That is because the rule asserts jurisdiction over any water feature so long as it affects the "chemical, physical, or biological integrity" of a traditional navigable water, interstate water, or territorial sea, ¹⁰³ thereby ignoring the conjunctive nature of both the statute (CWA § 101(a)) and Justice Kennedy's test. Changing the conjunctive to the disjunctive has profound consequences. By requiring only one type of connection (e.g., biological), the 2015 Rule effectively reinstates the Migratory Bird Rule that the Supreme Court struck down in SWANCC. Indeed, the 2015 Rule allows for jurisdiction based on a single function, such as the "[p]rovision of life cycle dependent aquatic habitat" between one water and some other distant water. ¹⁰⁴ That is the exact theory of jurisdiction reflected in the Migratory Bird Rule, under which isolated non-navigable ponds were jurisdictional solely "because they serve[d] as habitat for migratory birds." ¹⁰⁵

In fact, the 2015 Rule does even more than improperly revive the Migratory Bird Rule. In discussing the significant nexus test, the Agencies stated that they can find evidence of biological connectivity by identifying the presence of "amphibians, aquatic and semi-aquatic reptiles, [and] aquatic birds." Elsewhere in the preamble to the final 2015 Rule, the Agencies discussed the biological connectivity of waters in floodplains to include "integral components of river food webs, providing nursery habitat for breeding fish and amphibians, colonization opportunities for

⁹⁸ *Id.* at 780 (Kennedy).

⁹⁹ Id

^{100 547} U.S. at 778-79.

¹⁰¹ Id. at 780.

 $^{^{102}}$ Id.

¹⁰³ See 33 C.F.R. § 328.3(c)(5) (emphasis added).

¹⁰⁴ See 33 C.F.R. 328.3(c)(5)(ix).

¹⁰⁵ SWANCC, 531 U.S. at 171-72.

¹⁰⁶ Id.

stream invertebrates and maturation habitat for stream insects." ¹⁰⁷ What this means is most anything else that could live in and around water can singlehandedly serve as the basis for asserting jurisdiction over countless non-navigable, intrastate, isolated water features. Such a capacious assertion of jurisdiction "would result in a significant impingement of the States' traditional and primary power over land use" and thus must be repealed in light of *SWANCC*. ¹⁰⁸

5. The Rule's distance thresholds lack scientific support.

Water features are categorically jurisdictional as "adjacent" if they are within the 100-year floodplain of a category (1)-(5) feature and within 1,500 feet of its ordinary high water mark. 109 Additionally, waters are categorically jurisdictional if they are within 100 feet of the ordinary high water of a category (1)-(5) feature or within 1,500 feet of the high tide line of a category (1)-(3) feature. 110 On a case-specific basis, water features can be jurisdictional if they are within the 100-year floodplain of a category (1)-(3) feature or 4,000 feet of the ordinary high water mark of a (1)-(5) feature, and they are found to have a "significant nexus" to a category (1)-(3) feature. 111 In a nutshell, the Agencies failed to explain these distance cutoffs, and nothing in the record supports them.

The preamble to the final rule comes very close to admitting that the Agencies relied on the 100-year floodplain (to define "adjacent" and "significant nexus" waters) based on administrative convenience, not science. And if that were true, why did the Agencies choose that particular floodplain, rather than using a shorter period for which flood limits can be determined more easily and with more certainty? Given that the record contains no justification for using the 100-year floodplain, it is perhaps understandable that the Agencies concede the lack of "scientific consensus" over which flood interval to use. In any event, the lack of consensus does not justify the Agencies' dart throw.

The Agencies acted in a similarly arbitrary manner in choosing the 1,500-foot and 4,000-foot distance thresholds from the ordinary high water mark. While they vaguely claim reliance on unidentified "scientific literature," their own "technical expertise and experience," and the convenience "of drawing clear lines," it appears as though the Agencies plucked numbers from thin air. Indeed, the 2015 Rule offered no evidentiary basis for numbers that the Agencies basically *admitted* they made up. While it is true that the Agencies enjoy considerable deference from reviewing courts examining their technical and scientific judgments, such deference is inappropriate in the absence of evidence demonstrating how they arrived at the

¹⁰⁸ 531 U.S. at 174.

¹⁰⁷ *Id.* at 37,063.

¹⁰⁹ See 33 C.F.R. § 328.3(c)(2)(ii).

¹¹⁰ *Id.* § 328.3(c)(2)(i), (iii).

¹¹¹ Id. § 328.3(a)(8).

¹¹² See 80 Fed. Reg. at 37,089 (noting that the 100-year floodplain serves "purposes of clarity" and "regulatory certainty").

¹¹³ See EPA, Ouestions and Answers—Waters of the U.S. Proposal 5, perma.cc/7RRP-V46X.

¹¹⁴ 80 Fed. Reg. at 37,085; *see also id.* at 37,090 (referencing the Agencies' "extensive experience making significant nexus determinations" as having "informed the[ir] judgment" in selecting the 4,000-foot boundary). ¹¹⁵ *See* 80 Fed. Reg. at 37,090 (acknowledging that "the science does not point to any particular bright line").

specific numbers in the final rule. Because the 2015 Rule relies heavily on an arbitrary floodplain interval and distance thresholds, it must be repealed.

C. The 2015 Rule is Unconstitutional

The supplemental notice does not propose to repeal the 2015 Rule based on constitutional violations, though the Agencies indicate they are evaluating additional concerns such as whether the rule exceeded Congress's authority under the Commerce Clause. The Agencies also recognize (in the legal background discussion) that it is important to provide fair and predictable notice of the limits of federal jurisdiction under the CWA given the Act's substantial criminal and civil penalties. The reasons articulated below, the undersigned organizations believe the 2015 Rule is unconstitutional in at least two ways. First, it is vague to the point of violating basic principles of due process. Second, it violates the Commerce Clause and federalism principles.

1. The 2015 Rule is so vague that it violates the Due Process Clause.

The Fifth Amendment's Due Process Clause demands that a law provide regulated parties with fair notice so that they "know what is required of them [and] may act accordingly." A regulation that fails to do so is void for vagueness. "[T]he void for vagueness doctrine addresses at least two connected but discrete due process concerns." First, it ensures that citizens have fair notice of the rules governing them. Second, it provides standards for enforcement "so that those enforcing the law do not act in an arbitrary or discriminatory way." Of those concerns, the second is "the more important" because, absent objective guidelines, the law "may permit a standardless sweep [that] allows [government officials] to pursue their personal predilections." Thus, the Due Process Clause is offended by regulations "so imprecise that [arbitrary or] discriminatory enforcement is a real possibility."

A review of a few of the 2015 Rule's key terms and provisions shows that they fall woefully short of providing the kind of objective guidelines the Constitution requires.

Ordinary high water mark: In deciding whether the presence of physical indicators of an ordinary high water mark exist and where they lie, agency staff are allowed to rely on whatever "other ... means" they deem "appropriate." As if this catch-all language were not enough to permit standard-less sweeps by agency staff, existing Corps guidance states that "[t]here are no 'required' physical characteristics that must be present to make an OHWM determination." 124

¹¹⁶ See 83 Fed. Reg. at 32,248-49.

¹¹⁷ See id. at 32,237.

¹¹⁸ FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2317 (2012).

¹¹⁹ *Id*.

 $^{^{120}}$ Id.

¹²¹ Kolender v. Lawson, 461 U.S. 352, 357-58 (1983).

¹²² Gentile v. State Bar, 501 U.S. 1030, 1051 (1991).

^{123 33} C.F.R. § 328.3(c)(6).

¹²⁴ Corps Regulatory Guidance Letter No. 05-05, at 3 (Dec. 7, 2005).

Not only does the 2015 Rule fail to meaningfully constrain the Agencies in determining what constitutes an ordinary high water mark, it also fails to constrain them in deciding how to make that determination. Agency staff making these determinations need not visit any sites; instead, the rule blesses their ability to "establish" ordinary high water marks using "[o]ther evidence besides direct field observation." Regulators may, for instance, rely on computer models, "local stream maps," "aerial photographs," "light detection and ranging" data, and other unidentified "desktop tools that provide for the hydrologic estimation of discharge" to identify an ordinary high water mark, even where "physical characteristics" of bed and banks and an ordinary high water mark "are absent in the field." Landowners seeking to learn whether they have a jurisdictional water on or near their property are thus left to make their best guess—using whatever current or historic information they might be able to get their hands—with no guarantee that the Agencies will rely on the same factors. Just the opposite, the rule makes clear that decisions about which factors to rely on in assessing the presence of an ordinary high water mark are left to the Agencies' "experience and expertise." That is not the type of meaningful constraint that due process requires. 127

100-year floodplain: The provisions in the 2015 Rule dealing with adjacency (specifically, the definition of "neighboring") and case-specific assertions of jurisdiction over waters with a "significant nexus" to jurisdictional waters both reference the 100-year floodplain. While at first glance, it appears that landowners may be readily able to verify whether water features on their lands fall within this particular floodplain, the preamble to the final 2015 Rule demonstrates why the 100-year floodplain concept fails to give fair notice and is conducive to arbitrary enforcement.

The Agencies stated that they will rely on "published FEMA Flood Zone Maps to identify the location and extent of the 100-year floodplain" in implementing the 2015 Rule, yet they acknowledge that "much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and may not accurately represent existing circumstances on the ground." The Agencies further stated that they will assess accuracy "based on a number of factors" and, in the absence of an accurate and up-to-date FEMA map, the Agencies indicate they will rely on "other available tools to identify the 100-year floodplain," including "other Federal, State, or local floodplain maps, Natural Resources Conservation Service (NRCS) Soil Surveys (Flooding Frequency Classes), tidal gage data, and site-specific

¹²⁵ 80 Fed. Reg. at 37,076.

¹²⁶ Id. at 37,077.

¹²⁷ For similar reasons, the 2015 Rule is just as vague when it comes to ascertaining whether ditches are jurisdictional "tributaries" or whether they fall under one of the narrow ditch exclusions. Determining the applicability of the ditch exclusions can involve an inquiry into the "historical presence of tributaries using a variety of resources, such as historical maps, historical aerial photographs, local surface water management plans, street maintenance data, wetland and conservation programs and plans, as well as functional assessment and monitoring efforts." 80 Fed. Reg. at 37,078-79. How individual farmers and ranchers are expected to access and assess all of that data is a mystery, meaning they have no viable means of learning whether a ditch on their property is jurisdictional. That is particularly true because the Rule does not say how far back in history regulated parties must look in ascertaining the presence of a previously existing tributary.

¹²⁸ See 33 C.F.R. §§ 328.3(a)(8), 328.3(c)(2).

¹²⁹ 80 Fed. Reg. at 37,081.

modeling."¹³⁰ This approach does nothing to put landowners on notice of when waters on their property may be considered jurisdictional as either "adjacent" waters or as case-specific "significant nexus" waters. Even if landowners happen to be in a part of the country where FEMA has generated a floodplain map, they may not know whether agency staff will decide to deem those maps inaccurate or outdated. Should agency staff decide FEMA maps are not accurate, landowners then face the additional task of trying to figure out what "available tools" regulators may use to determine the 100-year floodplain for purposes of asserting jurisdiction.

Significant nexus: The 2015 Rule's "case-by-case" significant nexus test is obviously lacking in objective limits. At every stage, it turns on subjective observations and opaque analyses. Take the case of a farmer who has a small, isolated pond on his property. Even if everyone agrees that the pond has a direct connection to a primary water, the farmer's challenge is only beginning, because, in deciding whether his pond has a "significant nexus" to a primary water, he must still identify all traditional navigable waters, interstate waters, and tributaries within 4,000 feet of the pond. If the farmer finds such a water, he must then figure out whether regulators will conclude that the pond, together with "other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity" of the nearest primary water. ¹³¹ Such a task borders on crystal ball gazing.

Take, for instance, the Rule's definition of "similarly situated." This phrase encompasses waters that "function alike and [are] sufficiently close to function together in affecting downstream waters." But what does it mean for two ponds function alike or to function together? The Rule does not say, which means agency personnel are free to make their own judgment calls. Likewise, what qualifies as "significantly affect[ing]" a primary water? The Rule says only that an effect is significant when it is "more than speculative or insubstantial," but that poor attempt at a definition is no clearer than the word "significant." And what it means for a water feature to "significantly affect[]" the "integrity" of a primary water is anybody's guess.

Categorical exemptions: Many of the 2015 Rule's exemptions are difficult to apply, such as the exclusions for farm and stock watering ponds and various other features "created in dry land." While common sense suggests it should be easy to figure out whether something was created in "dry land," the lack of a definition for that term, combined with the Agencies' circular explanations, leave landowners puzzling over how to apply the "dry land" exclusions. In trying to explain what is "dry land," the Agencies first say the "term is well understood based on the more than 30 years of practice and implementation" and that it "refers to areas of the geographic landscape that are not water features such as streams, rivers, wetlands, lakes, ponds, and the like." The Agencies immediately turn around and state that they declined to define "dry land" in the rule because they "determined that there was no agreed upon definition given geographic and regional variability." Thus, the rule punts on providing "further clarity" until "implementation." The refusal to clarify a key term that is used in numerous exclusions

¹³⁰ *Id*.

¹³¹ 33 C.F.R. § 328.3(c)(5).

 $^{^{132}}$ *Id*.

¹³³ Id.

^{134 80} Fed. Reg. at 37,098.

¹³⁵ Id. at 37,098-99.

¹³⁶ *Id*.

means, of course, that agency staff retain broad discretion to limit the scope of exclusions that apply only to features created in "dry land." This opens the door to inconsistent and arbitrary results.

Elsewhere, the 2015 Rule includes an exemption for "puddles," but not for "depressional wetlands." This leaves farmers and ranchers to wonder what exactly distinguishes a recurring puddle from a small depressional wetland. The Rule does not clearly provide them answers. Similar problems exist in distinguishing "[e]rosional features, including gullies, rills, and other ephemeral features that do not meet the definition of a tributary," from jurisdictional tributaries. The rule defines a tributary in part based on the presence of "a bed and banks and an ordinary high water mark"—all of which are often present in the very gullies, rills, and other ephemeral features the rule says are exempt from its scope. Where to draw the line will ultimately be a question for agency staff to answer apparently based on little more than whim. Due process demands more.

* * *

Even where the Agencies have some relatively objective means of ascertaining the existence of a jurisdictional water, the vagueness problem will remain an intractable one for many regulated parties, who will be unable themselves to figure out whether waters on their lands are subject to federal jurisdiction. A rule is unconstitutionally vague if it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits." The 2015 Rule easily flunks that test. As noted above, in identifying ordinary high water mark, to use an example, the Agencies will be using remote sensing technology and desktop tools that are simply not available to the average landowner. That means the Agencies are free to assert jurisdiction over a depression in the landscape that is largely undetectable except through sophisticated digital photography or satellite imaging that most people cannot access.

Predictably, it is the Rule's "case-by-case" waters category that presents some of the greatest headaches for landowners. The ambiguity and complexity inherent in deciding whether a water "either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, *or* biological integrity of" a primary water based on "any single function or combination of functions performed by the water," hardly needs elaborating. It bears special mention, however, that determining a water feature's chemical, physical, or biological effects requires technical, scientific, and financial resources well beyond what most landowners possess. Because the Rule gives regulators too much discretion and regulated parties too little notice of what it covers, it violates due process. That is another independent reason for rescinding it.

¹³⁷ 33 C.F.R. § 328.3(b)(4)(vii)

¹³⁸ 80 Fed. Reg. at 37,093.

¹³⁹ 33 C.F.R. § 328.3(b)(4)

¹⁴⁰ Chicago v. Morales, 527 U.S. 41, 56 (1999).

¹⁴¹ 33 C.F.R. § 328.3(c)(5).

2. The 2015 Rule violates the Commerce Clause and federalism principles.

The States' authority to regulate and manage local lands and waters has long been viewed as a core sovereign interest. It is, in fact, "perhaps the quintessential state activity," which is one reason why the CWA expressly recognizes the States' inherent powers over local lands and water resources. It is, in fact, "perhaps the quintessential state activity," which is one reason why the CWA expressly recognizes the States' inherent powers over local lands and water resources. It is, in fact, "perhaps the quintessential state activity," in fact, "perhaps the quintessential state activity," in fact, "perhaps the quintessential state activity," is one reason why the CWA expressly recognizes the States' inherent powers over local lands and water resources.

The Supreme Court has relied on the "traditional state power" over land and water regulation to support narrower interpretations of the CWA's scope. In *SWANCC*, for example, the Court reasoned that allowing federal jurisdiction over an isolated, seasonal pond based solely on the presence of migratory birds not only failed to give effect to the statutory term "navigable," it raised "significant constitutional and federalism questions." On the latter holding, the Court clarified that, even were there some ambiguity regarding whether the Federal Government has jurisdiction over nonnavigable, isolated, intrastate waters, the Court would nevertheless have rejected the Corps' interpretation because would impermissibly "alter[] the federal-state framework by permitting federal encroachment upon a traditional state power"—namely, the States' "traditional and primary power over land and water use." 146

The plurality opinion in *Rapanos* likewise recognized the importance of respecting the federal-state balance that Congress struck in the CWA. The plurality chastised lower courts for "continu[ing] to uphold the Corps' sweeping assertions of jurisdiction over ephemeral channels and drains as 'tributaries,'" and for "continu[ing] to define 'adjacent' wetlands broadly." The four Justices expressed concern over how "even the most insubstantial hydrological connection may be held to constitute a 'significant nexus,'" despite the Court's holding in *SWANCC*. As Of particular importance here, the plurality emphasized that regulation of the "development and use" of "land and water resources" is a "quintessential state and local power."

The 2015 Rule fundamentally readjusts the federal-state balance and pushes the federal government's authority well beyond the limits of the Commerce Clause. As 31 States recently explained to the Sixth Circuit, the Rule covers "virtually every potentially wet area of the country," ranging "[f]rom prairie potholes in North Dakota, to arroyos in New Mexico, ephemeral drainages in Wyoming, and coastal prairie wetlands in Texas." The Agencies themselves admit that the Rule potentially covers "the vast majority of the nation's water features." What is left, one asks, of the States' longstanding and fundamental power to

¹⁴² FERC v. Mississippi, 456 U.S. 742, 768 n.30 (1982).

¹⁴³ See 33 U.S.C. § 1251(b).

¹⁴⁴ See SD Warren Co. v. Maine bd. of Envt'l Protection, 547 U.S. 370, 386–87 (2006) (observing that the CWA "provides for a system that respects the States' concerns" and interpreting another CWA provision in a way that "preserve[d] the state authority apparently intended").

¹⁴⁵ 531 U.S. at 164, 172.

¹⁴⁶ Id. at 173-74.

^{147 547} U.S. at 726-29.

¹⁴⁸ Id. at 728.

¹⁴⁹ *Id.* at 737-38.

¹⁵⁰ Murray Energy Corp. v. U.S. EPA, No. 15-3799, Doc. # 141, at 71.

¹⁵¹ *Id.* (quoting Rule's Economic Analysis).

regulate the lands and waters within their borders, if so many water and land features are now under the Agencies' jurisdiction?

The concern here is not merely over the geographic extent of federal regulation, but the effects of that regulation. When the Agencies assert jurisdiction under the CWA, the effect is often to displace state and local regulation. Compounding the problem, the federal standards and requirements that accompany federal jurisdiction under the CWA necessarily impose burdens directly on the States themselves. For example, States are required to develop, review, and (if appropriate) update water quality standards for federal jurisdictional waters within their borders. For waters not meeting those standards, States must develop often complicated total maximum daily loads. States must also issue water quality certifications for federal permit and licenses, including Section 404 permits issued by the Corps. 154

To accomplish such a sweeping grab of traditional state powers, the Agencies must identify some basis in the Constitution for doing so, but no such basis exists. Throughout the Technical Support Document for the 2015 Rule, the Agencies attempted to justify the Rule under the Commerce Clause, but those attempts fall flat. The Commerce Clause grants the Federal Government power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." That power extends to just three areas: (1) the "channels of interstate commerce," (2) the "instrumentalities of interstate commerce," and (3) "activities that substantially affect interstate commerce."

The 2015 Rule imposes federal authority outside of those areas. Most notably, because it reaches so far beyond waters that can actually be used for interstate commerce, it cannot be upheld as a regulation of the channels of interstate commerce. To be sure, the Commerce Clause gives Congress authority to regulate more than just navigable portions of waters. But the Rule goes far beyond that by sweeping in numerous local land and water features that are not navigable-in-fact and have only the barest connection to navigable-in-fact waters—even those features that connect to navigable waters just once in a century. Ephemeral trickles that happen to cross state lines, dry washes in Western deserts, and isolated wetlands nearly a mile from any tributary are all swept up in the Rule's scope. So are water features that are "adjacent" to navigable waters, even if there is no indication that those features ever connect to or otherwise affect navigable waters. Regulation of those features cannot possibly be justified as regulation of a channel of interstate commerce.

Nor can the Rule be justified as one covering activities that "substantially affect interstate commerce." For starters, it bears emphasis that the Supreme Court in *SWANCC* clearly reversed the lower court's holding that the CWA reaches as many waters as the Commerce Clause will allow, such as waters that are jurisdictional based on the regulation of activities that cumulatively

¹⁵² 33 U.S.C. § 1313.

¹⁵³ *Id.* § 1313(d).

¹⁵⁴ *Id.* § 1341(a)(1).

¹⁵⁵ U.S. Const. art. I, § 8, cl. 3.

¹⁵⁶ United States v. Lopez, 514 U.S. 549, 558-59 (1995).

¹⁵⁷ See, e.g., Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 523 (1941) (recognizing that "Cognress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions").

have a substantial effect on interstate commerce.¹⁵⁸ The Court declined the agency's invitation to engage in a substantial effects analysis and instead chose to avoid the significant constitutional and federalism questions raised by the Corps' Migratory Bird Rule.¹⁵⁹

Nonetheless, even if a court were to undertake a substantial effects analysis, the 2015 Rule would be unlikely to pass muster. In deciding whether regulation covers activities substantially affecting interstate commerce, the Supreme Court has considered: (1) whether the regulation addresses economic activity; (2) whether the regulation's reach is limited to activities having a connection with interstate commerce; and (3) whether the regulation's connection to interstate commerce is so attenuated that it would "effectually obliterate the distinction between what is national and what is local." The 2015 Rule does not qualify under any of those factors.

- The rule does not address economic activity. The Agencies can prohibit landowners from disposing of brush or leaves in shallow depressions on their properties, provided those depressions are within 1,500 feet of the ordinary high water mark of a "tributary" to a navigable water. That is not economic activity.
- The rule does not limit its reach to activities having a connection with interstate commerce. It defines tributaries, adjacent waters, and case-by-case waters in ways that capture numerous water features and usually-dry lands lacking any meaningful connection to interstate commerce. As just one example, the Agencies' case-by-case jurisdiction under the Rule authorizes regulation over lands or waters that "export ... organic matter" to a primary water. ¹⁶¹ So if a deer travels from a secluded land or water feature to a primary water and a plant or invertebrate hitchhikes on the deer's fur, that would be sufficient for the Agencies to assert jurisdiction under the Rule. Likewise, if the land feature "[e]xport[s] ... food resources, because the deer travels to eat there and then visits the primary water where it deposits seeds from the food resource, the Agencies could deem the land feature jurisdictional under the Rule. None of that has anything to do with interstate commerce.
- Like the legislation in *Lopez* and *Morrison*, the 2015 Rule relies on an attenuated causal chain that would, if followed, "obliterate the distinction between what is national and what is local." In *Lopez* and *Morrison*, the Court invalidated legislation in part because, whatever the aggregate effect of regulating noneconomic activity in those cases, allowing such regulation by the Federal Government would impermissibly permit the Federal Government to take over whole "areas of traditional state regulation." The same goes here, inasmuch as the rule's assertion of authority over the majority of hydrologic features

¹⁵⁸ See 531 U.S. at 168 n.3 & 166 (quoting from 191 F.3d 845, 850-52 (7th Cir. 1999)).

¹⁵⁹ See id. at 173.

¹⁶⁰ Lopez, 514 U.S. at 557; see also United States v. Morrison, 529 U.S. 598 (2000).

¹⁶¹ 33 C.F.R. § 328.3(c)(5)(vii).

¹⁶² See Lopez, 514 U.S. at 557.

¹⁶³ Morrison, 529 U.S. at 615.

throughout the country intrudes upon the States' authority to manage local lands and waters.

At bottom, the Rule is not supportable as an exercise of the Commerce Clause power. Instead, it usurps the States' longstanding and primary authority to regulate and oversee the lands and waters within their borders. In that respect, it is unconstitutional and ought to be repealed on that basis too. But even if repeal were not constitutionally required, the canon of constitutional avoidance, which requires that statutes be construed so as to minimize constitutional problems, calls for a far narrower interpretation of the CWA than the Rule puts forth. In addition, as the Supreme Court instructed in *SWANCC*, the CWA should not be read in a manner that displaces traditional state regulation absent a clear statement authorizing such displacement. There is nothing in the CWA authorizing displacement of state authority over land and water use. In fact, the Act contains the opposite statement: it recognizes, preserves, and protects such primary responsibilities and rights of the states. In the states of the states.

III. Conclusion

For the foregoing reasons, the undersigned organizations strongly support the Agencies' supplemental proposal to permanently repeal the 2015 Rule. That rule would effectively confer federal control over all but the most remote and unconnected waters, including features that are ubiquitous on farm and ranchlands that more closely resemble land than water, even though Congress did not intend to give the Agencies such control. While it is true that the rule does not currently apply, the Agencies cannot allow it to remain on the books and must instead repeal the rule in its entirety. Because the rule was an amendment to then-existing regulations, its repeal will effectively reinstate the pre-2015 regulations. As the undersigned organizations have long maintained, those preexisting regulations are far from ideal from the perspective of landowners who need to have a set of clear and logical rules to follow. Thus, the undersigned organizations encourage the Agencies to move forward with their ongoing efforts to develop a new rule that finally achieves the Agencies' goal of defining "waters of the United States" in a way that is faithful to Congress's intent, is consistent with Supreme Court precedent, and achieves clarity and regulatory certainty. For now, however, the Agencies can take a step in the right direction by finalizing their proposal to repeal what several courts have strongly suggested is a fatally flawed rule.

Sincerely,

American Farm Bureau Federation Agri-Mark, Inc. American Dairy Coalition American Sugar Cane League CropLife America Dairy Producers of New Mexico

¹⁶⁴ E.g., Clark v. Martinez, 543 U.S. 371, 379 (2005).

¹⁶⁵ SWANCC, 531 U.S. at 172-74.

Dairy Producers of Utah

Idaho Dairymen's Association

Illinois Farm Bureau

Iowa Farm Bureau Federation

Minnesota Agricultural Water Resource Center

Missouri Dairy Association

National Alliance of Forest Owners

National Association of State Departments of Agriculture

National Cattlemen's Beef Association

National Chicken Council

National Corn Growers Association

National Cotton Council

National Council of Farmer Cooperatives

National Milk Producers Federation

National Turkey Federation

Northeast Dairy Farmers Cooperatives

Ohio AgriBusiness Association

Ohio Corn & Wheat Growers Association

Oregon Dairy Farmers Association

South Dakota Agri-Business Association

St. Albans Cooperative Creamery

Texas Association of Dairymen

Texas Cattle Feeders Association

The Fertilizer Institute

United Egg Producers

United States Cattlemen's Association

Upstate Niagara Cooperative, Inc.

U.S. Poultry & Egg Association

USA Rice

Washington State Dairy Federation

Wyoming Ag-Business Association

CC: Matthew Z. Leopold, General Counsel, U.S. Environmental Protection Agency David Ross, Assistant Administrator for the Office of Water, U.S. Environmental Protection Agency

Appointment

From: Ross, David P [ross.davidp@epa.gov]

Sent: 2/20/2019 8:40:23 PM

To: Ross, David P [ross.davidp@epa.gov]; donp@fb.org

Subject: Farm Bureau Water Advisory Committee

Location: 600 Maryland Ave SW, Washington DC 20024 Suite 1000W

Start: 2/21/2019 3:00:00 PM **End**: 2/21/2019 3:30:00 PM

Show Time As: Busy

Recurrence: (none)

From: American Farm Bureau Federation [AFBFEvents@fb.org]

Sent: 12/3/2019 1:37:42 PM

To: Ross, David P [ross.davidp@epa.gov]

Subject: AFBF Centennial Celebration

AFBF Centennial Celebration



The American Farm Bureau Federation

Invites

David Ross

to join us as we celebrate our

100 Years

as The Voice of Agriculture

Tuesday, December 17, 2019

Kindly RSVP by December 6



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From: Andy O'Hare [aohare@tfi.org] 10/3/2019 6:42:02 PM Sent:

To: Wheeler, Andrew [wheeler.andrew@epa.gov]

CC: Ross, David P [ross.davidp@epa.gov]; Wildeman, Anna [wildeman.anna@epa.gov]

Subject: Florida Assumption of 404 Program Attachments: Florida 404 Assumption 10-3-19.pdf

Dear Administrator Wheeler,

Attached please find a letter in support of assumption of the permit program under Section 404 of the Clean Water Act by the state of Florida.

Please reach out with any questions on this matter.

Regards, Andy

Andrew (Andy) T. O'Hare, CAE Vice President, Public Policy The Fertilizer Institute 425 Third Street, SW, Suite 950 Washington, DC 20024 (202) 515-2704 (office)

Ex. 6 Personal Privacy (PP) (Cell) aohare@tfi.org





425 Third Street, S.W., Suite 950 Washington, D.C. 20024 tfl.org

October 3, 2019

Mr. Andrew Wheeler, Administrator U.S. Environmental Protection Agency 1200 Pennsylvania Avenue, N.W. Mail Code: 1101A Washington, DC 20460

RE: Florida Section 404 Permitting Program Assumption

Dear Administrator Wheeler,

The Fertilizer Institute (TFI) appreciates the opportunity to share with you our support for your agency's efforts to transition Clean Water Act Section 404 wetland permitting authority to the State of Florida. This would be a major accomplishment for the Administration and for the cause of cooperative federalism. We respectfully request your help in resolving the few remaining issues standing in the way of transitioning the full program to Florida. Florida is home to several TFI members who are subject to the Section 404 permit program who would potentially benefit from streamlined permit approvals through the Florida Department of Environmental Protection (FDEP).

TFI represents fertilizer manufacturers, transporters, wholesalers, brokers and retailers, all of whom are impacted by federal trade policy. Our members provide nutrients that are responsible for nearly half of a crop's yield, helping to ensure a stable and reliable food supply. The fertilizer industry supports nearly 500,000 American jobs and has an economic impact of over \$150 billion annually.

One of the remaining potential barriers to program assumption by Florida is the creation of an endangered species consultation framework. The State's proposal would provide our members in Florida with the same endangered species protection from the State that is currently available through a federally issued Section 404 permit. We need your help in ensuring that our members will have available to them the ability to obtain an environmentally protective 404 permit from FDEP.

TFI appreciates your consideration of our request for assistance on this initiative. A successful outcome will pave the way for other states to assume this program, thereby facilitating streamlined permitting outcomes for many facilities.

Thank you for considering our perspectives on this matter. Please do not hesitate to reach out with any questions. I may be reached at (202) 515-2704 or aohare@tfi.org.

Regards,

Andrew T. O'Hare

Vice President, Public Policy

andrew T. O'Hare

From: Letnes, Amelia [Letnes.Amelia@epa.gov]

Sent: 11/14/2019 9:35:59 PM

To: Michael Formica [formicam@nppc.org]

CC: Ross, David P [ross.davidp@epa.gov]; Sawyers, Andrew [Sawyers.Andrew@epa.gov]; Subramanian, Hema

[Subramanian.Hema@epa.gov]; Bennett, Tate [Bennett.Tate@epa.gov]; Wildeman, Anna

[wildeman.anna@epa.gov]; Aguirre, Janita [Aguirre.Janita@epa.gov]

Subject: FW: Water Quality Trading: Request for Extension on Comment Deadline

Attachments: 20191111 - NPPC Extension of Time Request Water Quality Trading.pdf; ATT00001.htm

Mr. Formica.

I just left you a voice mail, but I wanted to follow up via email as well. I wanted to let you know that we did go ahead and extend the comment period on this federal register notice. A notice of the extension should be publishing on November 19. This extension sets December 18 as the new final date for comments on this notice. Please let me know if you have any additional questions about the logistics or content of the federal register notice.

Thank you,

Amelia Letnes

(202) 564 5627 letnes.amelia@epa.gov

Begin forwarded message:

From: Michael Formica < formicam@nppc.org>
Date: November 11, 2019 at 12:41:05 PM EST

To: "'Ross.DavidP@epa.gov'" <Ross.DavidP@epa.gov>, "Sawyers, Andrew"

<Sawyers.Andrew@epa.gov>, 'Hema Subramanian' <subramanian.hema@epa.gov>, "'Elizabeth Tate

Bennett (Bennett.Tate@epa.gov)" <Bennett.Tate@epa.gov>

Subject: Water Quality Trading: Request for Extension on Comment Deadline

ΑII

I just submitted the attached request for a brief extension of time on the deadline for submitting comments to the proposed EPA policy on Water Quality Trading under the NPDES Program through Regulations.gov.

As I explained to Andrew and Hema at the recent meeting of the Animal Ag Discussion Group the NPPC Environment Committee is scheduled to meet next week. We will be spending one day at our meeting learning about ongoing water quality trading efforts and the opportunities and impacts they will have on agriculture including from both state officials as well as representatives of EPA Region 7. Our comments will be significantly informed by this discussion. The extension of time is requested so that we can have an internal discussion on the proposal and develop a coherent policy for the pork industry.

Thanks for your consideration of this request.

Michael C. Formica National Pork Producers Council 202.680.3820

November 11, 2019

Submitted via www.regulations.gov

Mr. David Ross Assistant Administrator, Office of Water U.S. Environmental Protection Agency 1200 Pennsylvania Avenue NW. Washington, DC 20460

Attention: Docket ID No. EPA-HQ-OW-2019-0415; FRL-10000-02-OW

Re: Request for Extension of Comment Period on Approaches to Baseline Issues in Watersheds with TMDLs, and Where Trading is a Regulatory Option

Dear Administrator Ross:

The National Pork Producers Council (NPPC) requests a 30-day extension of the comment period on US Environmental Protection Agency's (EPA) recently issued policy approaches for addressing 'baseline' (baseline policy approaches) issues in watersheds with EPA-approved Total Maximum Daily Loads (TMDLs) where policy makers would like to pursue water quality trading as a regulatory option for National Pollutant Discharge Elimination System (NPDES) permit compliance. EPA published the notice of these policy approaches and that it was seeking comment from the public on September 19, 2019.

NPPC's 60,000 pork producer members own and operate facilities that raise swine. NPPC works closely with 42 affiliated state associations to ensure that the U.S. pork industry remains a consistent and responsible supplier of high-quality pork to domestic and international markets. Our producer members are committed to sustainability, sound manure management to protect water and air quality, and the welfare and well being of their animals. NPPC, representing these farmers, has a direct and significant interest in any Clean Water Act (CWA) policies that are established by the federal government, including these baseline policy approaches.

We request this short extension to allow us the time to fully consult with our members and to gather information from state agencies and NPDES permit holders about how they see the baseline policy approaches best working. Some of this information gathering will not be able to take place until later this month. We seek this additional time to allow us to process what we have learned and provide you with meaningful comments.

We thank you for your time and consideration.

If you have any questions, please don't hesitate to contact me at 202-347-3600.

Sincerely,

Michael C. Formica

Assistant Vice President & Legal Counsel, Domestic Policy

National Pork Producers Council

From: American Farm Bureau Federation [AFBFEvents@fb.org]

Sent: 11/26/2019 6:59:53 PM

To: Ross, David P [ross.davidp@epa.gov]

Subject: AFBF Centennial Celebration

AFBF Centennial Celebration



The American Farm Bureau Federation

Invites

David Ross

to join us as we celebrate our

100 Years

as The Voice of Agriculture

Tuesday, December 17, 2019

Kindly RSVP by December 6



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From: American Farm Bureau Federation [AFBFEvents@fb.org]

Sent: 11/25/2019 6:23:06 PM

To: Ross, David P [ross.davidp@epa.gov]

Subject: AFBF Centennial Celebration

AFBF Centennial Celebration



The American Farm Bureau Federation

Invites

David Ross

to join us as we celebrate our

100 Years

as The Voice of Agriculture

Tuesday, December 17, 2019

Kindly RSVP by December 6



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From: Penman, Crystal [Penman.Crystal@epa.gov]

on behalf of Ross, David P [ross.davidp@epa.gov]

Sent: 4/15/2019 6:12:22 PM

To: Laura.Bishop@state.mn.us; wbuckner@noble.org; wburger@cfr.msstate.edu; sburgos@cityofboise.org;

preston.cole@wisconsin.gov; trey@deltawildlife.org; tdeppe@ilcorn.org; sgilson@nafsma.org; barb.glenn@nasda.org; SteveHe@cedar-rapids.org; bruce.holland@arkansas.gov; gkelly@res.us; rakenow@landolakes.com; keogh@adeq.state.ar.us; BKettler@isda.IN.gov; billk@cooperfarms.com;

tmale@policyinnovation.org; mmcdonald@wffmail.com; Tom.McDonald@5rcattle.com; rmunasifi@soy.org; michael.naig@Iowaagriculture.gov; obrien@willamettepartnership.org; donp@fb.org; jeremy-peters@nacdnet.org;

Rebecca Power [rlpower@wisc.edu]; grikard@mdeq.ms.gov; rsmith@tnc.org; charles.snavely@ky.gov;

dsteen@mosoy.org; jufner@naco.org; Wagner@ee.ok.gov; cwellenkamp@mrcti.org; kwesterbeek@smithfield.com; Willard@ncga.com; rwolf@iasoybeans.com; lle@uswateralliance.org; tina.d.rogers@tn.gov; ellis.agri@ohio.gov;

supora.hunter@epa.ohio.gov; angie.fletcher@illinois.gov

CC: Wildeman, Anna [wildeman.anna@epa.gov]; Rose, Bob [Rose.Bob@epa.gov]; Lousberg, Macara

[Lousberg.Macara@epa.gov]; Aguirre, Janita [Aguirre.Janita@epa.gov]; Campbell, Ann [Campbell.Ann@epa.gov];

timothy.gallaudet@noaa.gov; timothy_petty@ios.doi.gov; bill.northey@osec.usda.gov;

daniel.simmons@ee.doe.gov; jfreilly@usgs.gov; rickey.d.james.civ@mail.mil

Subject: Invitation: Nutrient Roundtable Discussion, May 15, 2019 in Baton Rouge, Louisiana

Attachments: Agenda for May 15 nutrient engagement (4-15-19).pdf; Logistics - May 2019 FWSC Meeting- Baton Rouge.pdf

On behalf of my colleagues at the U.S. Department of Agriculture, the Department of the Interior, the National Oceanic and Atmospheric Administration, the Department of the Army, and the Department of Energy, the Environmental Protection Agency (EPA) invites you to participate in a roundtable discussion with point source and nonpoint source stakeholders on how best to achieve nutrient reduction goals where there is a surplus of nitrogen and phosphorus in water bodies.

This discussion will occur with senior leadership from the agencies listed above as part of our recent efforts to better coordinate and focus federal resources to address some of the nation's most challenging water resource concerns. Senior leadership from these agencies have been closely coordinating on a variety of complex environmental and public health issues of concern across the federal family, including excess nutrients in surface water.

The roundtable discussion will be held in Baton Rouge, Louisiana, in the afternoon of May 15, 2019, and will include leadership from Hypoxia Task Force state members, other state and local officials, and point source and nonpoint source stakeholders. Participants will discuss existing impediments to reducing nutrient losses, how point sources and nonpoint source stakeholders can build stronger relationships, and the role of market-based approaches to achieve shared goals.

If you plan to attend, or if you have questions about the event, please contact Bob Rose, EPA Water Policy Staff, by May 1 (<u>rose.bob@epa.gov or 202-564-0322</u>). Enclosed with this invitation is an agenda, questions you may want to begin thinking about, and logistical information. Given space constraints, please do not forward this invitation to others.

Sincerely, David P. Ross Assistant Administrator

Agenda Nutrient Roundtable Discussion May 15, 2019 Baton Rouge, Louisiana

1:30 Welcome and Introductions

Dave Ross

Environmental Protection Agency Assistant Administrator for Water

1:45 Overview of Coordinated Federal Efforts

Tim Gallaudet

Department of Commerce Assistant Secretary for Oceans & Atmosphere

R.D. James (invited)

Department of the Army Assistant Secretary for Civil Works

Bill Northey

Department of Agriculture Under Secretary for Farm Production Conservation

Tim Petty

Department of the Interior Assistant Secretary for Water & Science

Jim Reilly

Department of the Interior Director of the U.S. Geological Survey

Daniel Simmons (invited)

Department of Energy Assistant Secretary for Energy Efficiency and

Renewable Energy

2:15 Roundtable Discussion on Nutrient Loss Reductions

What are the major opportunities for coordinating nutrient loss reduction strategies?

3:30 Break

3:45 Roundtable Discussion Continued

What can the federal government do to support implementation of state nutrient reduction plans?

Identify near term action items (next 6-12 months) for which the federal government can provide assistance.

4:45 Discuss Next Steps and Future Engagement Strategies

5:00 Adjourn

Nutrient Roundtable Discussion: Event Details

May 15, 2019

Hilton Baton Rouge Capitol Center 201 Lafayette Street Baton Rouge, LA 70801

Meeting RSVP

Please RSVP to Bob Rose (rose.bob@epa.gov) by April 17 with your name, phone number, and email address.

Hotel Reservations

Participants are responsible for their own travel, lodging, and other arrangements. A block of rooms has been reserved at the Hilton Baton Rouge Capitol Center. **Make your room reservation no later than May 1 (end of room block).**

Hilton Baton Rouge Capitol Center

201 Lafayette Street
Baton Rouge, LA 70801
225-344-5866 (hotel)
800-955-6962 (reservations)
Check-in: 3 PM • Check out: 11 AM

The Hilton is offering a group rate of \$100 for a single person room, plus tax, per night for the nights of May 15 and 16, 2019. A few rooms are available at that rate for the night of May 14, if needed. To make a reservation by phone, call 800-955-6962 and refer to the block name "HTF" or "Hypoxia Task Force" and the room block dates. You may also make your reservation online.

Contacts to Answer Questions

If you have questions about hotel reservations or other logistics information, please contact EPA's contractor, Dacia Mosso (Tetra Tech) at 703-385-1437 or dacia.mosso@tetratech.com.

If you have questions about other aspects of the meeting, please contact Bob Rose (USEPA) at 202-564-0322 or rose.bob@epa.gov.

Transportation

The hotel is approximately 8 miles from Baton Rouge Metropolitan (BTR) Airport.

Taxi

A one-way cab ride from BTR to the hotel costs approximately \$20. Estimated Uber fare is \$15-\$20. Drive time is estimated at 12 minutes.

Hotel Courtesy Shuttle

The hotel offers a complimentary courtesy shuttle (seats approximately 8 people) to/from BTR Airport. Upon arrival, call the hotel at 225-344-5866. The shuttle will promptly leave to pick you up. It typically takes around 10 minutes for the driver to arrive at BTR Airport; guests will be picked up right outside of baggage claim on the 1st floor.

When departing, the shuttle leaves the property consistently, every 30 minutes on the hour and half hour. To reserve a seat on the next ride to the airport, stop by in person or call the front desk, and provide the following information on the hotel shuttle log: (1) name(s), (2) date of shuttle ride, and (3) specific time requested to leave hotel for BTR Airport.

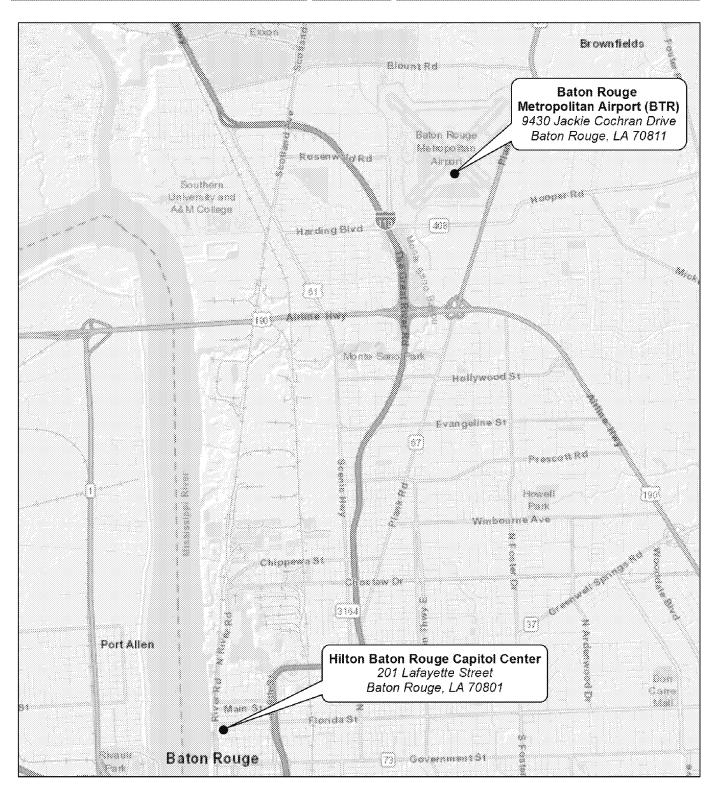
Driving Directions from BTR Airport

Get on I-110 S from Veterans Memorial Boulevard. Follow I-110 S to Laurel Street. and take exit 1H toward downtown. Turn left onto Lafayette Street. The hotel is located on the right.

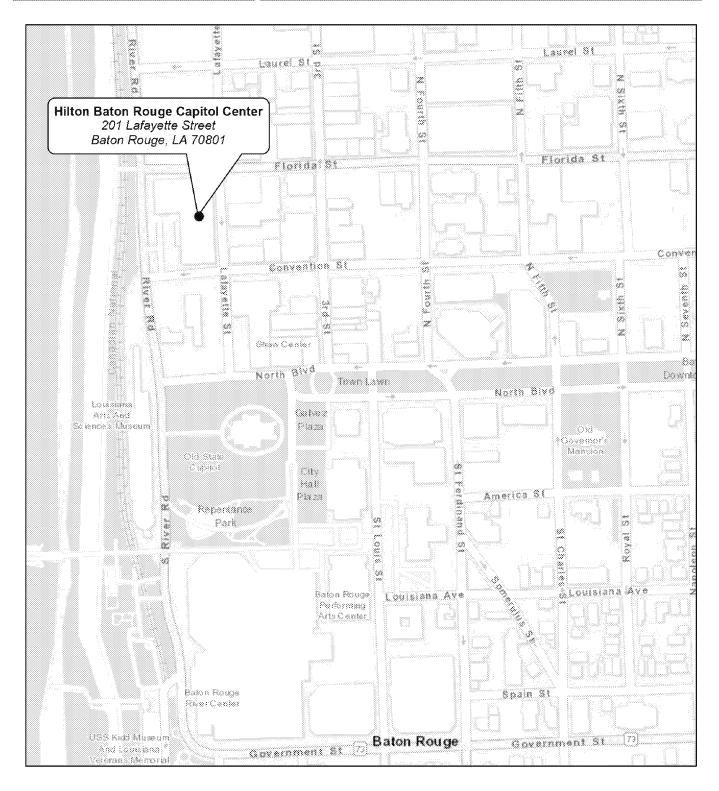
Hotel Parking

The hotel offers on-site valet parking for \$22 daily. Self-parking is not available.

Overview Map of the Airport and Hotel

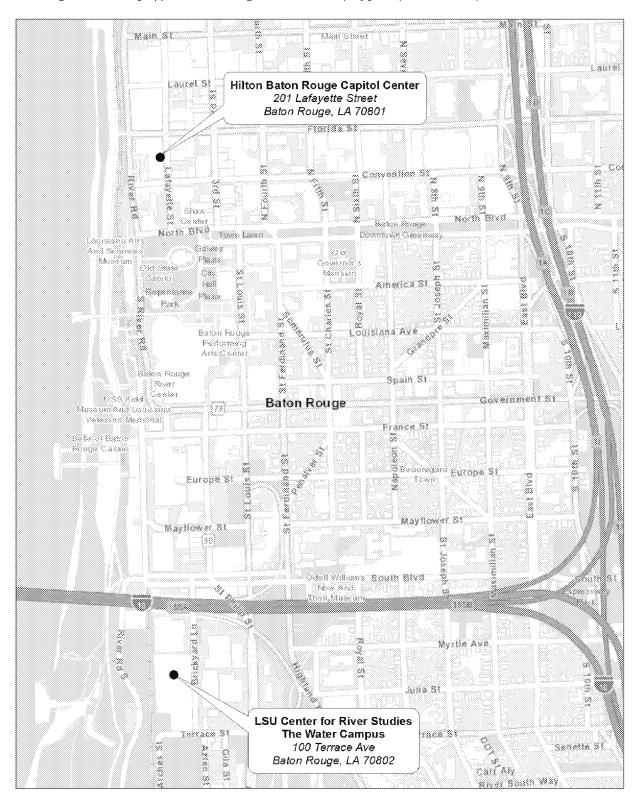


Map of the Area around the Hotel



Map of the Hotel and Networking Session

Attendees of the Nutrient Roundtable Discussion are welcome to join a public Networking Session on May 15 from 5:30 PM until 7:30 PM at the LSU Center for River Studies: The Water Campus located at 100 Terrace Avenue, Baton Rouge, LA 70802. Transportation options will be shared in advance of the meeting. Hypoxia Task Force Public Meeting website: https://water-meetings.tetratech.com/Hypoxia/StaticPublic/index.htm.



From: Lee Bridgett [leeb@fb.org] Sent: 8/13/2018 9:16:54 PM

To: Ross, David P [ross.davidp@epa.gov]; Leopold, Matt (OGC) [Leopold.Matt@epa.gov]

Subject: AFBF Comments re: WOTUS and Recodification of Preexisting Rule

Attachments: AFBF SNPRM Comment (SWANCC).pdf; AFBF SNPRM Comment (Technical).pdf

Mr. Leopold and Mr. Ross,

Please see the attached comments filed today by the American Farm Bureau Federation along with several other organizations regarding the definition of "Waters of the United States" and recodification of the preexisting rule. (Docket ID EPA-HQ-OW-2017-0203-15104).

Thank you,

Lee Bridgett

Administrative Assistant, Public Affairs



AMERICAN FARM BUREAU FEDERATION®

600 Maryland Avenue SW, Suite 1000W Washington, DC 20024

Phone: 202-406-3627 | Email: <u>LeeB@fb.org</u> | <u>www.fb.org</u>

From: Lee Bridgett [leeb@fb.org]
Sent: 7/19/2018 8:55:18 PM

To: Ross, David P [ross.davidp@epa.gov]

Subject: Thank You for Speaking to the American Farm Bureau Federation's Council of Presidents

Attachments: 2018.07.19 David Ross Thank You Letter.pdf

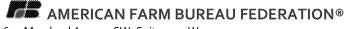
Mr. Ross,

Please see the attached letter from American Farm Bureau Federation President Zippy Duvall, thanking you for taking the time to speak at the AFBF Council of President's meeting last week.

Best Regards,

Lee Bridgett

Administrative Assistant, Public Affairs



600 Maryland Avenue SW, Suite 1000W Washington, DC 20024

Phone: 202-406-3627 | Email: <u>LeeB@fb.org</u> | <u>www.fb.org</u>

From: Don Parrish [donp@fb.org]
Sent: 10/12/2018 10:04:56 PM

To: Northey, Bill - OSEC, Washington, DC [Bill.Northey@osec.usda.gov]

CC: Aguero, Michael - OSEC, Washington, DC [Michael.Aguero@osec.usda.gov]; Ross, David P [ross.davidp@epa.gov];

Wildeman, Anna [wildeman.anna@epa.gov]; CloverAdams, Jamie - OSEC, Washington, DC

[Jamie.CloverAdams@osec.usda.gov]; Fisher, Andrew D - Washington, DC [Andrew.Fisher@osec.usda.gov]

Subject: Re: Meeting Request - Nutrient Loss

Thanks Bill - I will work with Michael next week.

Don

Sent from my iPhone

On Oct 12, 2018, at 5:20 PM, Northey, Bill - OSEC, Washington, DC <Bill.Northey@osec.usda.gov> wrote:

Don,

Please work with Michael to set up a meeting. I'd be quite interested in hearing your suggestions.

Thank you,

Bill

Bill Northey

USDA Under Secretary

Farm Production and Conservation: Natural Resources Conservation Service,

Farm Service Agency, Risk Management Agency

Executive Asst: Michael Aguero

Michael.Aguero@usda.gov

202-260-3276

From: Don Parrish < donp@fb.org > Sent: Friday, October 12, 2018 4:49 PM

To: Northey, Bill - OSEC, Washington, DC < Bill Northey@osec.usda.gov>

Subject: Meeting Request - Nutrient Loss

Bill

I would like to request a meeting to discuss USDA's role in nutrient loss reduction strategies. Farm Bureau, The Fertilizer Institute, and two representatives from the Ag nutrient policy council would like to discuss the following topics with you, Anna Wildeman and David Ross from EPA.

- Major opportunity for USDA leadership in nutrient loss
- Explore opportunities to implement nutrient loss reduction practices using Farm Bill programs and
- Using USDA's leadership to engage state and local groups to aid in implementation of an overall nutrient strategy

If possible, I would like to suggest we can find time to meet before November 4th. Thanks and I look forward to hearing from you.

Don R. Parrish

American Farm Bureau Federation

donp@fb.org 202~406~3667 This electronic message contains information generated by the USDA solely for the intended recipients. Any unauthorized interception of this message or the use or disclosure of the information it contains may violate the law and subject the violator to civil or criminal penalties. If you believe you have received this message in error, please notify the sender and delete the email immediately.

From: Timothy Gallaudet - NOAA Federal [timothy.gallaudet@noaa.gov]

Sent: 1/22/2019 6:33:22 PM

To: Ross, David P [ross.davidp@epa.gov]

CC: kurt boeckmann [kurt.boeckmann@dnr.mo.gov]; Peter.Goodmann@ky.gov; Rebecca Power [rlpower@wisc.edu];

asharp@ofbf.org; sam@nrwa.org; lle@uswateralliance.org; Johnny.Bradberry@LA.gov [Johnny.Bradberry@la.gov];

Enger.Kinchen@la.gov; gkelly@res.us; Matt@nrwa.org; SBerry@uswateralliance.org; berndt@nlc.org;

Iclemens@tnc.org; tdeppe@ilcorn.org; Steve He@cedar-rapids.org; chornback@nacwa.org; billk@cooper farms.com; tdeppe@ilcornback@nacwa.org; billk@cooper farms.com; b

akrantz@nacwa.org; shannon.lotthammer@state.mn.us; mmcdonald@wffmail.com; Lvickman@newwater.us;

kwesterbeek@smithfield.com; bwicker@inagnutrients.org; rwolf@iasoybeans.com; John Benefield

[Ryan.Benefield@arkansas.gov]; wbuckner@noble.org; sburgos@cityofboise.org; craig.butler@epa.ohio.gov;

trey@deltawildlife.org; sgilson@nafsma.org; barb.glenn@nasda.org; rakenow@landolakes.com;

bkettler@isda.in.gov; tmale@policyinnovation.org; Larry.Maxwell@tn.gov; Tom.McDonald@5rcattle.com; lmoody@tfi.org; rmunasifi@soy.org; michael.naig@lowaagriculture.gov [michael.naig@iowaagriculture.gov]; obrien@willamettepartnership.org; donp@fb.org; jeremy-peters@nacdnet.org; Raymond.Poe@illinois.gov;

Russell.Rasmussen@wisconsin.gov; grikard@mdeq.ms.gov; steven.rowe@newtrient.com;

John.Schlichter@agri.ohio.gov; dsteen@mosoy.org; jufner@naco.org; cwellenkamp@mrcti.org; Willard@ncga.com; tsigmund@newwater.us; Wildeman, Anna [wildeman.anna@epa.gov]; Forsgren, Lee [Forsgren.Lee@epa.gov]; Bill.Northey@osec.usda.gov; timothy_petty@ios.doi.gov; rickey.d.james.civ@mail.mil; ryan.a.fisher12.civ@mail.mil; cathy.tripodi@hq.doe.gov; Gulliford, Jim [gulliford.jim@epa.gov]; Best-Wong, Benita [Best-Wong, Benita@epa.gov]

Subject: Re: Cancellation Notice: Baton Rouge Nutrient Roundtable Discussion

Sorry to hear, Dave, but understandable.

Tim Gallaudet, Ph.D., Rear Admiral, U.S. Navy (Ret.)
Assistant Secretary of Commerce for Oceans and Atmosphere / Deputy NOAA Administrator,
Acting Under Secretary of Commerce for Oceans and Atmosphere / NOAA Administrator



On Jan 22, 2019, at 10:49 AM, Ross, David P < ross.davidp@epa.gov > wrote:

Good morning everyone,

Unfortunately, given the ongoing federal government shutdown, we have decided to cancel the upcoming Hypoxia Task Force Meeting and Nutrient Roundtable events in Baton Rouge next week. Thanks again for your willingness to engage with EPA and our federal partners on these important issues. We look forward to rescheduling these events as soon as possible.

Regards,

Dave

David P. Ross Assistant Administrator, Office of Water U.S. Environmental Protection Agency Office: (202) 564-5700

Ross.DavidP@epa.gov

<berndt@nlc.org>; 'lclemens@tnc.org' <lclemens@tnc.org>; 'tdeppe@ilcorn.org' <tdeppe@ilcorn.org>;
'StavoNa@codor rapide org' <StavoNa@codor rapide org>; 'chorphack@nacusa org'

'SteveHe@cedar-rapids.org' <SteveHe@cedar-rapids.org>; 'chornback@nacwa.org'

<chornback@nacwa.org>; 'billk@cooperfarms.com' <billk@cooperfarms.com>; 'akrantz@nacwa.org'

<akrantz@nacwa.org>; 'shannon.lotthammer@state.mn.us' <shannon.lotthammer@state.mn.us>;

'mmcdonald@wffmail.com' <mmcdonald@wffmail.com>; 'Lvickman@newwater.us'

'bwicker@inagnutrients.org' <bwicker@inagnutrients.org>; 'rwolf@iasoybeans.com'

<rwolf@iasoybeans.com>; 'Ryan.Benefield@arkansas.gov' <Ryan.Benefield@arkansas.gov>;

'wbuckner@noble.org' <wbuckner@noble.org>; 'sburgos@cityofboise.org' <sburgos@cityofboise.org>;

'craig.butler@epa.ohio.gov' <craig.butler@epa.ohio.gov>; 'trey@deltawildlife.org'

<trey@deltawildlife.org>; sgilson@nafsma.org; 'barb.glenn@nasda.org' <barb.glenn@nasda.org>;

'rakenow@landolakes.com' <rakenow@landolakes.com>; 'bkettler@isda.in.gov'

<bkettler@isda.in.gov>; 'tmale@policyinnovation.org' <tmale@policyinnovation.org>;

'Larry.Maxwell@tn.gov' <Larry.Maxwell@tn.gov>; 'Tom.McDonald@5rcattle.com'

<Tom.McDonald@5rcattle.com>; 'Imoody@tfi.org' <Imoody@tfi.org>; 'rmunasifi@soy.org'

<rmunasifi@soy.org>; 'michael.naig@lowaagriculture.gov' <michael.naig@lowaagriculture.gov>;

'obrien@willamettepartnership.org' <obrien@willamettepartnership.org>; 'donp@fb.org'

<donp@fb.org>; 'jeremy-peters@nacdnet.org' <jeremy-peters@nacdnet.org>;

'Raymond.Poe@illinois.gov' <Raymond.Poe@illinois.gov>; 'Russell.Rasmussen@wisconsin.gov'

<Russell.Rasmussen@wisconsin.gov>; 'grikard@mdeq.ms.gov' <grikard@mdeq.ms.gov>;

'steven.rowe@newtrient.com' <steven.rowe@newtrient.com>; 'John.Schlichter@agri.ohio.gov'

<John.Schlichter@agri.ohio.gov>; 'dsteen@mosoy.org' <dsteen@mosoy.org>; 'jufner@naco.org'

<jufner@naco.org>; 'cwellenkamp@mrcti.org' <cwellenkamp@mrcti.org>; 'Willard@ncga.com'
<Willard@ncga.com>

Cc: Wildeman, Anna <wildeman.anna@epa.gov>; Forsgren, Lee <Forsgren.Lee@epa.gov>; 'Bill.Northey@osec.usda.gov' <Bill.Northey@osec.usda.gov>; 'timothy_petty@ios.doi.gov' <timothy_petty@ios.doi.gov>; 'timothy.gallaudet@noaa.gov' <timothy.gallaudet@noaa.gov>; 'rickey.d.james.civ@mail.mil' <ri>ckey.d.james.civ@mail.mil' <ri>cyan.a.fisher12.civ@mail.mil'>; 'cathy.tripodi@hq.doe.gov' <cathy.tripodi@hq.doe.gov>; Gulliford, Jim <gulliford.jim@epa.gov>; Best-Wong, Benita <Best-Wong, Benita@epa.gov>

Subject: Baton Rouge Nutrient Roundtable Discussion

Hi everyone,

From: Ross, David P

Given the ongoing government shutdown, it may be necessary to cancel our upcoming nutrient roundtable discussion in Baton Rouge, Louisiana on January 29. We are very much looking forward to the roundtable discussion, and are holding off on canceling the meeting as long as possible.

Secretary Naig and I, as co-chairs of the Hypoxia Task Force, have been discussing whether and when to cancel the Hypoxia Task Force meeting scheduled to take place in Baton Rouge on January 29-30. We decided to make a final decision on Tuesday morning, January 22nd. As the Task Force meeting and roundtable discussion are linked for scheduling purposes, we'll communicate with this group on Tuesday morning as well.

Thank you for your willingness to engage with EPA and our federal partners on this important issue. If we need to cancel, we will try to reschedule the meeting as quickly as possible.

Regards,

Dave

David P. Ross Assistant Administrator, Office of Water U.S. Environmental Protection Agency Office: (202) 564-5700

Ross.DavidP@epa.gov

CC:

From: Civins, Jeff [Jeff.Civins@haynesboone.com]

Sent: 4/2/2019 7:58:02 PM

To: 'toby.baker@tceq.texas.gov' [toby.baker@tceq.texas.gov]; 'sara.burgin@bracewelllaw.com'

[sara.burgin@bracewelllaw.com]; 'molly.cagle@bakerbotts.com' [molly.cagle@bakerbotts.com]; 'goldmancarterj@nwf.org' [goldmancarterj@nwf.org]; 'JCruden@bdlaw.com' [JCruden@bdlaw.com]; 'cdemonaco@foxrothschild.com' [cdemonaco@foxrothschild.com]; 'gabrieleckstein@law.tamu.edu'

[gabrieleckstein@law.tamu.edu]; 'brent.fewell@earthandwatergroup.com'

[brent.fewell@earthandwatergroup.com]; 'agates@mwlaw.com' [agates@mwlaw.com];

'Katharine.hayhoe@ttu.edu' [Katharine.hayhoe@ttu.edu]; Jacobson, Doug [jacobson.doug@epa.gov];

'nkidd@tamus.edu' [nkidd@tamus.edu]; 'AKrantz@nacwa.org' [AKrantz@nacwa.org]; 'tmcgarity@mail.utexas.edu' [tmcgarity@mail.utexas.edu]; 'james.mcguire@dallascityhall.com' [james.mcguire@dallascityhall.com]; Mendoza, Mary S. [Mary.Mendoza@haynesboone.com]; 'kim.mickelson@houstontx.gov' [kim.mickelson@houstontx.gov];

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'mshahid@nexsenpruet.com' [mshahid@nexsenpruet.com]; 'wstrickland@jw.com' [wstrickland@jw.com] 'Bruce Fogerty' [bruce.fogerty@earthx.org]; 'robin cain' [razincain86@yahoo.com]; 'robin@tscrow.com'

[robin@tscrow.com]; 'trammell@tscrow.com' [trammell@tscrow.com]; Carlock, Camie

[Camie.Carlock@haynesboone.com]; Lehnhardt, Trudi [Trudi.Lehnhardt@haynesboone.com]; 'Taryn Darter'

[taryn.darter@earthx.org]

Subject: RE: EarthX Law Symposium Participant Info

I should have added that each panelist should have 7-10 minutes or so for opening remarks on any pertinent topic they'd like to discuss and for the remainder of the time, we're looking to them and their moderator to develop a series of questions they might all address. As noted, we're also asking the moderators to encourage the audience to ask questions and participate in the discussion as well.

haynes*boone*Jeff Civins

Senior Counsel jeff.civins@haynesboone.com

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vCard | Bio | Website

From: Civins, Jeff

Sent: Tuesday, April 2, 2019 2:42 PM

To: 'toby.baker@tceq.texas.gov' <toby.baker@tceq.texas.gov>; 'sara.burgin@bracewelllaw.com' <sara.burgin@bracewelllaw.com>; 'molly.cagle@bakerbotts.com' <molly.cagle@bakerbotts.com>; 'goldmancarterj@nwf.org' <goldmancarterj@nwf.org>; 'JCruden@bdlaw.com' <JCruden@bdlaw.com>; 'cdemonaco@foxrothschild.com' <cdemonaco@foxrothschild.com>; 'gabrieleckstein@law.tamu.edu' <gabrieleckstein@law.tamu.edu>; 'brent.fewell@earthandwatergroup.com' <bre>brent.fewell@earthandwatergroup.com>; 'agates@mwlaw.com' <agates@mwlaw.com>; 'Katharine.hayhoe@ttu.edu' <Katharine.hayhoe@ttu.edu>; 'jacobson.doug@epa.gov' <jacobson.doug@epa.gov>; 'nkidd@tamus.edu' <nkidd@tamus.edu>; 'AKrantz@nacwa.org' <AKrantz@nacwa.org>; 'tmcgarity@mail.utexas.edu' <tmcgarity@mail.utexas.edu>; 'james.mcguire@dallascityhall.com' <james.mcguire@dallascityhall.com>; Mendoza, Mary S. <Mary.Mendoza@haynesboone.com>;

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Bruce and crew have sent—or will be sending a checklist for you to complete that covers a number of logistical items. As noted, they will make reservations for you at the <u>Hilton Anatole</u>. They may also be able to assist on travel reservations.

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World renown climate scientist, Katharine Hayhoe

Panel discussions following each of the keynote speaker presentations will bring together leading scholars and subject matter experts from diverse perspectives for lively discussions of the issues. The Honorable **Sheldon Whitehouse** of Rhode Island will be the luncheon speaker and Texas Attorney General **Ken Paxton** will give opening remarks. The complete agenda and site to register are <u>here</u>.

Please consider attending and forward this email to anyone who you think might be interested in attending, including especially colleagues in your own organization. Thanks!

We encourage you to use social media as well. For example, our media folks showed me how to post an <u>invite</u> on LinkedIn.

Thank you all again!

haynes*boone* Jeff Civins

Senior Counsel jeff.civins@haynesboone.com

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vCard | Bio | Website

From: Civins, Jeff

Sent: Wednesday, March 27, 2019 9:12 AM

To: 'toby.baker@tceq.texas.gov' < toby.baker@tceq.texas.gov'; 'sara.burgin@bracewelllaw.com' < sara.burgin@bracewelllaw.com'; 'molly.cagle@bakerbotts.com' < molly.cagle@bakerbotts.com'; 'goldmancarterj@nwf.org'; Civins, Jeff < Jeff.Civins@haynesboone.com'; 'JCruden@bdlaw.com'; 'cdemonaco@foxrothschild.com' < cdemonaco@foxrothschild.com'; 'gabrieleckstein@law.tamu.edu'; 'brent.fewell@earthandwatergroup.com'; 'agates@mwlaw.com' < agates@mwlaw.com'; 'Katharine.hayhoe@ttu.edu'; 'Jacobson.doug@epa.gov'; 'nkidd@tamus.edu'; 'nkidd@tamus.edu'; 'AKrantz@nacwa.org' < AKrantz@nacwa.org'; 'tmcgarity@mail.utexas.edu'

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Cc: 'Bruce Fogerty' < bruce.fogerty@earthx.org; robin@tscrow.com; robin@tscrow.com; 'trammell@tscrow.com; Carlock, Camie < Camie.Carlock@haynesboone.com; Lehnhardt, Trudi < Trudi.Lehnhardt@haynesboone.com>
Subject: FW: EarthX Law Symposium Participant Info

EarthX Law Participants,

Thank you all for agreeing to participate in this year's EarthX Law Symposium, to be held at the Hall of State at Fair Park in Dallas on Friday April 26th. As you know, EarthX is the largest celebration of the environment in the world. Further information about EarthX can be found <a href="https://here.com

The Program. As you will note, we have featured speakers for opening remarks (Texas Attorney General Ken Paxton) and lunch (U.S. Senator Sheldon Whitehouse of RI) and have 5 sessions, each of which will have a keynote speaker (and, in one case, 2 keynote speakers), to be followed by a panel discussion. We anticipate that each panelist will give brief opening remarks and that there then will be a discussion among the panelists, with questions posed by the moderator, other panelists, and the Symposium attendees. Your session moderators will be in touch to coordinate your sessions. We encourage dialogue, not only among the participants in each session, but also among the attendees and participants in other sessions. We expect this program, as in years past, will be both informative and thought provoking.

Bios, papers, and Power Points. We request that each of you provide us as soon as possible a one-page bio. Bruce's assistant Robin will send you a link today via email that will make this easy for you to send us. You need not prepare a written presentation, but if you'd like to, we'd be happy to make it available to attendees and post it on the Symposium website. You also are not required to prepare a power point, but if you'd like to use one, please let us know. Please provide us any written materials and power points no later than one-week before the Symposium.

Logistical Information. There will be a complimentary speaker/moderator reception Thursday evening from 5 PM to 6:30 PM to which each of you are invited. It will be at the Hilton Anatole, at a location to be determined. Following the reception, each of you is invited to attend an EarthX dinner, from 7:00 PM to 9:00 PM, also at the hotel, at which Susan Eisenhower will moderate a discussion between Senators Lindsey Graham and Sheldon Whitehouse. We will reserve tables at that event for Symposium speakers and moderators. The dinner is complimentary to you. Following the Symposium reception Friday afternoon, the EarthXGlobalGala is being held at the Statler Hotel from 6:30 PM to 11 PM. You are invited to attend and to bring a guest at a discount rate of \$200 per person. On Saturday morning, there may be a special event or events to which you are invited. We will provide further information about them. The Symposium will arrange for and cover the cost for your hotel stay at the Hilton Anatole for Thursday night and, if you will be staying over, to attend the Gala, Friday night as well. And the Symposium will pick up your travel costs (airfare and taxis and/or

Uber/Lyft). There will be constant shuttle service from the hotel to Fair Park, which is the easiest way to get back and forth. As noted, to assist us in making the necessary arrangements, please be on the lookout for the checklist we will be sending you, which we ask that you fill out and return as soon as possible.

Publicity. We will be publicizing this event on the EarthX website and by communications with numerous organizations and distribution lists, but we encourage you to publicize it and your role in it on your organization's website and by press releases and direct communications to your contacts.

For logistical questions, please contact Bruce; for substantive questions, Jeff. Our contact information is below.

Thank you again for agreeing to participate. We look forward to working with you.

Bruce and Jeff



Bruce Fogerty Business Development 214.450.5010 (Mobile)

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Jeff Civins
Senior Counsel
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Haynes and Boone, LLP 600 Congress Avenue

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From: Civins, Jeff [Jeff.Civins@haynesboone.com]

Sent: 4/2/2019 7:41:49 PM

To: 'toby.baker@tceq.texas.gov' [toby.baker@tceq.texas.gov]; 'sara.burgin@bracewelllaw.com'

[sara.burgin@bracewelllaw.com]; 'molly.cagle@bakerbotts.com' [molly.cagle@bakerbotts.com]; 'goldmancarterj@nwf.org' [goldmancarterj@nwf.org]; 'JCruden@bdlaw.com' [JCruden@bdlaw.com]; 'cdemonaco@foxrothschild.com' [cdemonaco@foxrothschild.com]; 'gabrieleckstein@law.tamu.edu'

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Subject: EarthX Law Symposium Participant Info

Attachments: EarthxLaw FINAL.PDF

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Cc: 'Bruce Fogerty' <bru>
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Bruce and Jeff



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Haynes and Boone, LLP 600 Congress Avenue

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Friday, April 26 2019 8:30AM-5:30PM Hall of State • Fair Park

Water, Water Everywhere...

REGISTER TO ATTEND GLIGI FOR Full Agenda

EarthX--the world's largest environmental experience—is featuring a Law and Policy Symposium, "Water, Water Everywhere...," that focuses on critical water-related legal and policy concerns and how to address them. The Symposium will be held in conjunction with EarthX on Friday, April 26, at Fair Park in Dallas.

Texas Attorney General Ken Paxton will give opening remarks on Cooperative Federalism--how the states and federal government can productively work together, and Rhode Island Senator Sheldon Whitehouse will speak on ocean issues. In addition, there will be five lively sessions; the topics and keynote speakers include:

- Texas Water Issues—Flooding, drought, water availability and quality
 -Toby Baker, TCEQ Executive Director & Brooke Paup, TWDB Member
- Water Issues Facing Cities—Water-related issues including those faced not only by Flint and more recently Austin, but by all cities, relating to water quality, water quantity, and infrastructure -John Cruden, Former US DOJ Assistant General for the Environment
- Coastal Issues Flooding, sea level rise, dredging, and environmental concerns
 -Nim Kidd, Chief of Texas Emergency Management
- Water Quality Issues—Waters of the US and the Maui case
 -David Ross, EPA Assistant Administrator for the Office of Water
- Water Energy Interface—Fracking, pipelines, cooling water, & LNG terminals
 -Katharine Hayhoe, Climate Scientist

Panel discussions following each of the keynote speaker presentation will bring together leading legal scholars and subject matter experts from environmental organizations, business, academia, and the government to discuss their varied perspectives on these topics. This symposium is a truly unique opportunity to not only hear, but to also participate in, a series of discussions with prominent environmental thought leaders.

Fee: General \$250 • Government \$100 • Student \$50 (Scholarships Available)

Click Here for Hotel Accommodations

7.5 hours of CLE credit has been applied for.

For more information, contact bruce.fogerty@EarthX.org

From: Civins, Jeff [Jeff.Civins@haynesboone.com]

Sent: 3/27/2019 2:11:43 PM

To: 'toby.baker@tceq.texas.gov' [toby.baker@tceq.texas.gov]; 'sara.burgin@bracewelllaw.com'

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CC: 'Bruce Fogerty' [bruce.fogerty@earthx.org]; robin cain [razincain86@yahoo.com]; 'robin@tscrow.com'

[robin@tscrow.com]; 'trammell@tscrow.com' [trammell@tscrow.com]; Carlock, Camie [Camie.Carlock@haynesboone.com]; Lehnhardt, Trudi [Trudi.Lehnhardt@haynesboone.com]

Subject: FW: EarthX Law Symposium Participant Info

Attachments: EarthX Symposium 2019_Water Water Everywhere_Draft Schedule 4828-6508-4804 v.9.pdf

EarthX Law Participants,

Thank you all for agreeing to participate in this year's EarthX Law Symposium, to be held at the Hall of State at Fair Park in Dallas on Friday April 26th. As you know, EarthX is the largest celebration of the environment in the world. Further information about EarthX can be found <a href="https://nexess.py.new.org/new.org

The Program. As you will note, we have featured speakers for opening remarks (Texas Attorney General Ken Paxton) and lunch (U.S. Senator Sheldon Whitehouse of RI) and have 5 sessions, each of which will have a keynote speaker (and, in one case, 2 keynote speakers), to be followed by a panel discussion. We anticipate that each panelist will give brief opening remarks and that there then will be a discussion among the panelists, with questions posed by the moderator, other panelists, and the Symposium attendees. Your session moderators will be in touch to coordinate your sessions. We encourage dialogue, not only among the participants in each session, but also among the attendees and participants in other sessions. We expect this program, as in years past, will be both informative and thought provoking.

Bios, papers, and Power Points. We request that each of you provide us as soon as possible a one-page bio. Bruce's assistant Robin will send you a link today via email that will make this easy for you to send us. You need not prepare a written presentation, but if you'd like to, we'd be happy to make it available to attendees and post it on the Symposium website. You also are not required to prepare a power point, but if you'd like to

use one, please let us know. Please provide us any written materials and power points no later than one-week before the Symposium.

Logistical Information. There will be a complimentary speaker/moderator reception Thursday evening from 5 PM to 6:30 PM to which each of you are invited. It will be at the Hilton Anatole, at a location to be determined. Following the reception, each of you is invited to attend an EarthX dinner, from 7:00 PM to 9:00 PM, also at the hotel, at which Susan Eisenhower will moderate a discussion between Senators Lindsey Graham and Sheldon Whitehouse. We will reserve tables at that event for Symposium speakers and moderators. The dinner is complimentary to you. Following the Symposium reception Friday afternoon, the EarthXGlobalGala is being held at the Statler Hotel from 6:30 PM to 11 PM. You are invited to attend and to bring a guest at a discount rate of \$200 per person. On Saturday morning, there may be a special event or events to which you are invited. We will provide further information about them. The Symposium will arrange for and cover the cost for your hotel stay at the Hilton Anatole for Thursday night and, if you will be staying over, to attend the Gala, Friday night as well. And the Symposium will pick up your travel costs (airfare and taxis and/or Uber/Lyft). There will be constant shuttle service from the hotel to Fair Park, which is the easiest way to get back and forth. As noted, to assist us in making the necessary arrangements, please be on the lookout for the checklist we will be sending you, which we ask that you fill out and return as soon as possible.

Publicity. We will be publicizing this event on the EarthX website and by communications with numerous organizations and distribution lists, but we encourage you to publicize it and your role in it on your organization's website and by press releases and direct communications to your contacts.

For logistical questions, please contact Bruce; for substantive questions, Jeff. Our contact information is below.

Thank you again for agreeing to participate. We look forward to working with you.

Bruce and Jeff



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EARTHX.ORG

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EARTHX LAW AND POLICY SYMPOSIUM 2019 "WATER, WATER EVERYWHERE..." Hall of State, Texas State Fair, Dallas Friday April 26, 2019

8:00—8:40 Registration/Breakfast & Welcome—<u>Jeff Civins</u>, Haynes and Boone, LLP

• 8:40—9:00 Opening Remarks-"Keeping Both Oars in the Water"

Ken Paxton, Texas Attorney General

9:00—10:20 Texas Water Issues-"Don't Mess with Texas"

Keynotes: Toby Baker, TCEQ Executive Director

Brooke Paup, TWDB Member

Moderator: Paul Seals, Guida Slavich

Panelists:

Vanessa Casado Perez, Associate Professor, Texas A & M Law School

Mary Sahs, Sahs & Associates

Howard Slobodin, General Counsel, Trinity River Authority

• 10:20-10:40 Break

• 10:40—Noon Water Issues Facing Cities- "Going with The Flow"

Keynote; <u>John Cruden</u>, Beveridge & Diamond, former US DOJ Asst. Attorney General for the Environment and Natural Resources Division

Moderator: Allan Gates, Mitchell Williams

Panelists:

Gabriel Eckstein, Texas A & M Law School

James McGuire, Managing Director of the Office of Environmental

Quality, City of Dallas

Suzanne Murray, Haynes and Boone, LLP, former Regional Counsel, EPA

Region 6

• Noon—1:00 Lunch: Ocean Issues-"Making Waves," The Hon. Sheldon Whitehouse

Senator, Rhode Island

• 1:00—2:20 Coastal Issues-"Surf's Up"

Flooding, Building & Rebuilding, Disaster Response

Keynote: Nim Kidd, Chief of Texas Emergency Management

Moderator: Charles De Monaco, Fox Rothschild LLP

Panelists:

J. Douglas Jacobson, Gulf of Mexico Program and National Estuary

Programs Coordinator, EPA Region 6

<u>Kim Mickelson</u>, Senior Assistant City Attorney, City of Houston Legal Dept.

Mary Shahid, Nexsen Pruet

• 2:20—3:40 Water Quality Issues-"A River Runs Through It"

WOTUS, Groundwater discharges

Keynote: <u>David Ross</u>, EPA Assistant Administrator for Water (invited)

Moderator: Brent Fewell, Earth & Water law

Panelists:

Jan Goldman Carter, National Wildlife Federation

Don Parrish, American Farm Bureau

Adam Krantz, CEO, National Association of Clean Water Agencies

Sara Burgin, Bracewell LLP

• 3:40—4:00 Break

• 4:00—5:20 Water-Energy Interface-"Thirst For Power"

Upstream, Midstream, Downstream Keynote: <u>Katharine Hayhoe</u>, Texas Tech

Moderator: Mary Mendoza, Haynes and Boone, LLP

Panelists:

Tom McGarity, Professor, UT Law School

Molly Cagle, Baker & Botts Wes Strickland, Jackson Walker

• 5:20—6:00 Cocktail Reception, Hall of State

Fee: General \$250 • Government \$100 • Student \$50 (7.5 hours of CLE is being applied for)

Register at: https://earthx.org/conference/earthxlaw/

From: Chad Watts [watts@ctic.org]
Sent: 1/23/2018 9:47:43 PM

To: Ross, David P [ross.davidp@epa.gov]

CC: Cambell.ann@epa.gov; Penman, Crystal [Penman.Crystal@epa.gov]; Flahive, Katie [Flahive.Katie@epa.gov]; Lara

Moody [Imoody@tfi.org]; Tammy Taylor [taylor@ctic.org]

Subject: Invitation to the CTIC Board Meeting

Mr. Ross and Ms. Wong:

The US Environmental Protection Agency and the Conservation Technology Information Center (CTIC) have had a long-standing and fruitful partnership around many facets of promoting conservation and sustainability within the agriculture community and encouraging positive environmental outcomes. CTIC is a non-profit organization based out of West Lafayette, Indiana with a focus specifically on promoting tools and technologies to farmers that encourage positive environmental outcomes and promote on-farm sustainability, productivity and profitability. Since 1982 we have been working with farmers, agribusinesses and other university and agricultural leaders to equip farmers and their advisors with tools and technologies that encourage wise use and conservation of natural resources. As such, there are many places where the missions of US EPA and CTIC overlap.

Annually, CTIC hosts a Board of Directors meeting in the Washington, DC area and invites partnering agencies and organizations to attend so that you can learn more about CTIC and so that we can explore additional avenues of collaboration between our organization and US EPA. I would like to invite you to attend our upcoming Board of Directors meeting in the DC area, which will take place February 20th, from 9 to 4 PM EST at The Fertilizer Institute's offices on 425 Third Street S.W. in Washington, DC. During the meeting, If you and your team from US EPA could spend 15 -20 minutes outlining some of the work that EPA is doing relative to encouraging conservation and sustainability within the agricultural community, I would appreciate it very much. Following your presentation, I would encourage interaction between you and your team and the CTIC Board of Directors to explore additional ways that CTIC and EPA can collaborate on current and future initiatives that are mutually beneficial to each organization.

CTIC's Board of Directors consists of members of agribusiness, ag retailers, associations, and non-governmental organizations, and is supported by government advisors and advisors from academia. You can visit the CTIC Board of Directors web page for more information on CTIC Board members.

If you could please confirm your availability for the February 20th meeting and your ability to present a brief synopsis of EPA activities relative to agriculture, I would appreciate it very much. We can work with your schedule to find a suitable time on the board meeting agenda for your participation.

I look forward to hearing from you and look forward to having you at our CTIC Board meeting in February.

Chad R. Watts
Executive Director

watts@ctic.org

Visit us Online at www.ctic.org



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🐴 Please consider the environment before printing this email.

From: Michael Formica [formicam@nppc.org]

Sent: 2/27/2018 6:20:01 PM

To: Ross, David P [ross.davidp@epa.gov]

Subject: Brad McKinney

Attachments: McKinney, Bradley - Resume.pdf

David

Congrats on getting confirmed as AA for Water. Was great to see you yesterday at Matt's swearing in ceremony.

Thanks again for participating on the ANPC call the other day. Sorry I wasn't able to participate on the call, but had a different (non environment) issue arise that's taking up lots of my time.

As I mentioned, I've been trying to help Brad McKinney (son of USDA's Undersecretary for Trade) land a spot with the Administration, preferably at EPA. While he isn't a lawyer, Brad's got good general experience in and around DC in agricultural policy (including a stint working for Andy Wheeler at Faegre Baker) and would be a great fit for your team (or elsewhere at EPA) as it continues to focus on the challenges posed by nutrients and engages with the larger ag community and USDA. His resume is attached for your review.

Thanks again.

Michael C. Formica A.V.P. & Legal Counsel, Domestic Policy National Pork Producers Council 202.680.3820